TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 132.

COMMERCIAL PUBLISHING COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL C. BECKWITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 12, 1902.

(16,282.)

(18,222.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 369.

COMMERCIAL PUBLISHING COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL C. BECKWITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals, State of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff and Respondent,
vs.
SAMUEL C. BECKWITH, Defendant and Appellant.

Case and Exceptions.

Porter & Kilvert, attorneys for defendant and appellant, 154 Nassau street, New York city.

Otis & Pressinger, attorneys for plaintiff and respondent, 111 Broadway, New York city.

A copy of within paper this day received, Aug. 11 1899 Otis & Pressinger, 111 Broadway, N. Y.

1 Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.

Statement Required by Rule 41.

The summons herein was served on defendant on February 26, 1896.

The complaint was served March 23, 1896.

The amended answer of the defendant was served on April 14, 1896.

The supplemental answer of defendant was served January 5, 1897.

Otis & Pressinger originally appeared and have since continued as attorneys for the plaintiff.

Porter & Kilvert originally appeared and have since continued as attorneys for the defendant.

2 Supreme Court of the State of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
against
SAMUEL C. BECKWITH, Defendant.

Plaintiff Desires Trial within the City and County of New York.
Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, February 28th, 1896.

OTIS & PRESSINGER,
Plaintiff's Attorneys.

Post-office address and office, No. 111 Broadway, New York.

1—369

3 New York Supreme Court, City and County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.

The plaintiff, by Otis & Pressinger, its attorneys, bring this action against the defendant, and for cause of action alleges on information and belief:

I.

That the plaintiff is a foreign corporation duly organized under the laws of the State of Tennessee, and engaged in the publication of a newspaper known as the Commercial Appeal, at Memphis in said State.

II.

That prior to the 30th day of September, 1893, the Memphis Appeal Company, a corporation organized under the laws of the State of Tennessee was engaged in the publication at said city of Memphis of a newspaper known as the Memphis Appeal-Avalanche.

That on or about the date aforesaid one Andrew D. Gwynne and others began an action in the chancery court of Shelby county, Tennessee, against said The Memphis Appeal Company, together with the defendant herein, and others, the object of said action being to enforce a trust deed for the benefit of creditors made by said Memphis Appeal Company. That on the 30th day of September,
4 1893, a decree was duly entered in said action appointing one William J. Chase, receiver of the property and assets of said Memphis Appeal Company, and instructing him to continue the publication of said Memphis Appeal-Avalanche, under the direction of the court. That thereafter said receiver, pursuant to said decree, continued the publication of said newspaper from the 30th day of September, 1893, to the 16th day of June, 1894, and during said period of time published advertisements at the special instance and request of the various parties mentioned in Schedule A hereto annexed, of the reasonable value of the various amounts set opposite their respective names and amounting in the aggregate to $5,796.32, which various sums of money said parties then and there promised and agreed to pay to said receiver.

III.

That on or about the 5th day of October, 1893, a portion of the controversey embraced in said action of Andrew D. Gwynne *et al. vs.* Memphis Appeal Company *et al.*, to wit: the controversey between the plaintiffs therein and said Samuel C. Beckwith was removed into the circuit court of the United States of the western division of the western district of Tennessee, by said Samuel C. Beckwith pursuant to the provisions of the statutes of the United States in such case made and provided, and thereafter said portion of said controversey was pending in the court last aforesaid.

IV.

That thereafter two other actions were brought in said chancery court of Shelby county, Tennessee, against said Memphis Appeal Company and others, one by J. B. Myrick *et al.* the other by Jacob Fink *et al.* That thereafter said three actions so pending in said chancery court of Shelby county were consolidated into one action.

5 V.

That thereafter and during the month of April, 1894, decrees were simultaneously entered in all of said actions thus pending in the chancery court of Shelby county and the circuit court of the United States appointing J. B. Clough and E. B. McHenry commissioners to sell all the property of every kind and description of said Memphis Appeal Company thus vested in said receiver, also all moneys which were then due or should thereafter become due to said receiver by reason of the operation of said newspaper in his hands as aforesaid, which included the moneys set forth in said Schedule A.

VI.

That thereafter and on the 16th day of June, 1894, said property, together with the accounts due said receiver, as aforesaid, *were* sold by said commissioners at public auction, in the city of Memphis, pursuant to said decree of sale; when and where said property was struck off to one West J. Crawford, he being the highest, best and last bidder therefor. That at the time of said sale the amounts mentioned in Schedule A above referred to, were due from the various parties therein mentioned to said receiver. That on the 3d day of July, 1894, decrees were simultaneously entered in said actions thus pending in the said chancery court of Shelby county, Tennessee, and said circuit court of the United States confirming said sale.

VII.

That at the time of the making of said various decrees, said chancery court of Shelby county and said circuit court of the United States had jurisdiction of the subject-matter of said various actions and of the parties thereto.

6 VIII.

That on or about the 9th day of July, 1894, said West J. Crawford duly assigned and transferred to the plaintiff, all and singular, the claims, demands and rights of action to which he acquired title by the sale above referred to and which included the claims set forth in said Schedule A.

IX.

That the defendant has collected from the various parties mentioned in said Schedule A, a portion of the sums due from them respectively as therein shown, amounting in the aggregate to the sum of $3,902.74, as set forth in Schedule B, hereto annexed, and at the dates therein specified.

X.

That the moneys so collected by defendant were received by him without authority and same were the property of plaintiff or his predecessors in title. That plaintiff, subsequent to the 25th day of February, 1896, and prior to the commencement of this action, demanded from the defendant the moneys so collected, but defendant has failed, omitted and refused to pay over said moneys to plaintiff or any part thereof.

Wherefore plaintiff demands judgment against the defendant for the sum of three thousand nine hundred and two and $\frac{74}{100}$ dollars, with interest thereon from the 1st day of January, 1894, together with the costs of this action.

OTIS & PRESSINGER,
Plaintiff's Attorneys, 111 *Broadway, New York.*

7 CITY AND COUNTY OF NEW YORK, *ss:*

A. Walker Otis, being sworn, says that he is one of the attorneys for the plaintiff herein. That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to such matters as are therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

That the reason why this verification is not made by plaintiff is because it is foreign corporation.

That the grounds of deponent's belief as to all matters not stated on his own knowledge consist of written and oral statements made to him by the various officers and agents of the plaintiff and by an examination of copies of the record of the court proceedings referred to in the complaint.

A. WALKER OTIS.

Sworn to before me this 23d day of March, 1896.
J. EDWARDS WYCKOFF,
Notary Public, N. Y. Co.

8 EXHIBIT A.

Bates & Morse, New York	$1,572 47
C. I. Hood & Co., Lowell, Mass	583 35
Lord & Thomas, Chicago, Ill	515 72
Swift & Bradfield	350 00
World's Dispensary Medical Ass'n, Buffalo, N. Y	337 98
Golden Gate Adv't'g Co., San Francisco, Cal	306 00
Geo. P. Rowell & Co., N. Y	205 20
Dauchy & Co	196 59
C. N. Erickson	194 20
Anglo-American Drug Co	175 00
U. S. Chemical Co	145 80
Enoch Morgan's Sons, N. Y	115 41
George S. Parvin, Cincinnati, Ohio	109 02

G. E. Gurrier	106 30
Pond's Extract Co	100 00
Journal Adv't'g Agency, N. Y	83 33
Miles Medical Co	75 00
E. M. Hoops, Wilmington, Del	74 15
Alden & Faxen	73 64
Pond Lily Co	70 29
J. W. Wupperman	68 33
J. Lowenherz, New York	63 00
Radway & Co., 32 Warren St., N. Y	62 50
The Edwin Alden Co., Cincinnati, Ohio	35 27
Stanley Day	29 37
S. R. Niles	26 60
R. Gunther & Co., Chicago, Ill	20 03
The Jno. F. Phillips Adv't'g Co., New York	17 07
Cleveland Baking Powder Company	16 67
N. E. Medical Institute	15 64
Geo. H. Reager, Philadelphia, Pa	15 00
J. H. Pozzoni	11 36
G. W. Place & Co	9 46
Andrew Rotto	4 80
Fletcher Newspaper Adv't'g Ag'cy, Cleveland, Ohio	2 93
W. N. Gates & Co	2 76
Wm. A. Sherman, Providence, R. I	2 70
9 American Advertising Agency, Temple court, N. Y	1 80
E. C. Doke	68
T. C. Evans, Boston, Mass	30
Isabella Toilet Company	30
Cranston & Co	30
	$5,796 32

EXHIBIT B.

1894.	
Oct. 9, Bates & Morse	$844 35
1895.	
Jan. 5, Hood & Company	562 50
1894.	
Aug. 4, Oct. 11, Lord & Thomas	56 66
Jan. 15, Sept. 29, Swift & Bradfield	350 00
Dec. 24, World's Dispensary	283 25
Aug. 21, Golden Gate Advertising Company	288 07
Ap'l 14, Geo. P. Rowell & Company	201 76
May 4, Dauchy & Company	55 22
July 30, E. N. Erickson	175 00
Jan. 17, July 17, Anglo-American Drug Company	162 50
Ap'l 28, July 17, Enoch Morgan's Sons Company	106 25
Jan. 22, Ap'l 21, George S. Parvin	87 59
Jan. 25, 11, George E. Gurrier	106 30
M'ch 14, Pond's Extract Company	100 00

July 30, Aug. 10, Journal Advertising Company	66	66
Feb. 5, Miles Medical Agency	75	00
M'ch 6, July 25, E. M. Hoopes	69	76
May 26, Oct. 17, Alden & Faxen	26	78
Ap'l 3, Dec. 4, J. W. Wuppermann	50	00
Feb. 14, Ap'l 5, Joseph Lowenherz	53	90
June 26, Radway & Company	62	50
Dec. 2, Stanley Day	29	38
M'ch 20, S. R. Niles	18	92
July 30, Cleveland Baking Powder Company	16	67
10 Oct. 9, New England Medical Institute	15	64
May 12, George H. Reager Advertising Agency	15	00
Feb. 15, J. A. Pozzoni	11	36
Jan. 6, George W. Place	9	46
Nov. 16, W. N. Gates & Company		68
1893.		
Oct. 2, E. C. Dake		68
1894.		
June 9, T. C. Evans		30
July 1, Isabella Toilet Company		30
Jan. 7, Cranston & Company		30
	$3,902	74

New York Supreme Court, City and County of New York.

COMMERCIAL PUBLISHING COMPANY
against
SAMUEL C. BECKWITH.

Samuel C. Beckwith the defendant in this action for an amended anwer to the complaint therein represents and alleges as follows:

I.

He has not knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph of said complaint designated "I."

II.

He has not knowledge or information sufficient to form a belief as to any of the allegations contained in that paragraph of said complaint designated "II" except as to the allegation therein that prior to September 30th, 1893, the Memphis Appeal Company was
11 a corporation under the laws of Tennessee, and engaged in publishing a newspaper at Memphis known as the Memphis Appeal-Avalanche, which allegation the defendant admits to be true.

III.

He has not knowledge or information sufficient to form a belief as to any of the allegations contained in those and each of those

paragraphs of said complaint which are designated III, IV, V, VI, VII and VIII.

IV.

In answer to the allegations contained in that paragraph of said complaint designated IX, he admits that he has collected the sum of $3,902.74 from the various persons therein referred to, and denies that the plaintiff or any other person other than the defendant has or ever had any right, claim or title to said moneys or any thereof.

V.

He denies the allegations in that paragraph of said complaint designated X, that the moneys alleged to have been collected by the defendant as set forth in said complaint, were collected and received by him without authority, and that the same were the property of the plaintiff or his predecessors in alleged title thereto, and admits the allegation in said paragraph that plaintiff has demanded of him the said monies and that he has refused to pay over the same on said demand.

VI.

For a further amended answer to said complaint and as a defense in this action the defendant alleges, that prior to the 30th day of September, 1893, the Memphis Appeal Company mentioned in said complaint entered into a contract or agreement with this defendant for the publication of certain matter in the said newspaper the Memphis Appeal-Avalanche referred to in said complaint, and
12 that under the terms and conditions of said agreement, the said company had been prior to and was at the time of the alleged appointment of the receiver Chase, publishing such matter in said newspaper under said agreement and continued so to do after said appointment, and that the said agreement was in force and being carried out at all of said times, and is still in full force and has never been cancelled or terminated by said parties or by any other means or proceedings whatsoever, and that the money alleged in said complaint to have been collected and received by said defendant was collected and received by him under and pursuant to the terms and conditions of said agreement on account of such publications, and in no other way, and that neither the said alleged receiver, or said plaintiff or his alleged predecessors in title ever had any right or title to said money or any part thereof, and that the same and all thereof were collected and received by defendant rightfully and under the authority of and pursuant to said agreement, and defendant alleges that the said alleged receiver Chase, never acquired any right or title to said publications being made, or which were made under said agreement, or to the monies charged therefor by said newspaper, and that said alleged receiver never conveyed or sold any right or title thereto to the said Crawford, or to any other person or company, except it may be in form merely, and that plaintiff has not, nor has he ever had any right or title to said money or to any part thereof, and that the same and

all thereof was and is the sole property of the said defendant, under and by virtue of, and in pursuance of the terms and conditions of the contract and agreement aforesaid.

Wherefore defendant asks that said complaint be dismissed with costs.

PORTER & KILVERT,
Defendant's Attorneys.

Office and post-office address, No. 154 Nassau street, New York city.

13 CITY AND COUNTY OF NEW YORK, *ss:*

Samuel C. Beckwith, being duly sworn, deposes and says, that he is the defendant in this action, and that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

S. C. BECKWITH.

Sworn to before me this 14th day of April, 1896.
WM. D. NEILLEY,
Notary Public, N. Y. Co.

New York Supreme Court.

COMMERCIAL PUBLISHING COMPANY
vs.
SAMUEL C. BECKWITH.
} Supplemental Answer.

The defendant, Samuel C. Beckwith, by way of a supplement to his amended answer to the complaint in this action, and in addition to said amended answer reaffirming and repeating all the allegations, answers and defenses contained in his said amended answer to said complaint, and hereby making the same a part of the supplemental answer respectfully alleges and represents upon information and belief:

I.

14 That on or about the 21st day of September, 1893, the Memphis Appeal Company mentioned in said complaint executed and delivered to Andrew D. Gwynne and Robert J. Morgan as trustees, a certain so-called deed of trust, dated said day in and by which said company purported and attempted to convey to said Gwynne & Morgan as such trustees, certain of the property of said company, and that said Gwynne and Morgan took, accordingly, possession of said property under such deed, and thereafter commenced an action in the chancery court of Shelby county, State of Tennessee against The Memphis Appeal Company, Samuel C. Beckwith, the defendant in this action and others, as defendants, the bill of complaint in which action was filed in the clerk's office of said court at Memphis in said Shelby county on the 30th day of Septem-

ber, 1893, and said action was based upon said deed of trust, and had for its object, among other objects, the alleged protection and use of the property mentioned and referred to in said deed.

II.

That such proceedings were had in said suit that one William J. Chase, a resident of Memphis aforesaid, was on the said 30th day of September appointed by the said court as a receiver therein of the said property covered by and involved in said deed, and that he thereupon qualified and entered into the performance of his duty as such receiver, and thereafter and in such capacity attempted and purported to sell the claim set up in the complaint in this action as a cause of action against this defendant, and in so doing executed and delivered to one West J. Crawford as an alleged purchaser thereof from him as such receiver, a purported assignment of the same and that thereafter the said Crawford attempted and purported to assign his interest in said claim to the plaintiff in this action, and that the said claim now constitutes the cause of complaint in this action.

15 III.

That thereafter and on or about the 8th day of July, 1896, such proceedings were further had in said action on appeal therein entered on March 26th, 1896, to the supreme court of the State of Tennessee, a court of competent appellate jurisdiction, that the said deed of trust and all proceedings had in the said chancery court based thereon in said suit of Gwynne & Morgan against Memphis Appeal Company, Samuel C. Beckwith *et al.*, inclusive of the said appointment of said receivers was decreed and adjudged by said supreme court to be invalid and void—and that judgment was duly and accordingly entered in said supreme court on said 8th day of July, 1896, in Minute Book, 96, p. 334, &c., and that such action and judgment of the supreme court was thereafter duly made the judgment and decree of the said chancery court.

IV.

That by reason of the said action by the said supreme court the alleged title in said Gwynne & Morgan under said trust deed and in said receiver appointed as aforesaid, and in said Crawford as said alleged purchaser, and in said plaintiff as the alleged purchaser from said Crawford, failed and never vested in them or any of them, either in fact, law or equity, and that by reason of the same and all thereof the said alleged title to said cause of action in said plaintiffs have failed and that he has no right, title or interest therein and no cause of action thereon in this suit against said defendant therein, and that the said adjudication and judgment of said supreme court, and as so made the judgment of the said chancery court thereupon became and now constitutes a bar to the prosecution of this action against the defendant by plaintiff therein.

16 Wherefore defendant asks that the complaint in this action be dismissed as in said amended answer prayed, and that he have his costs and disbursements of this action.

PORTER & KILVERT,
Defendant's Attorneys.

Office and post-office address, number 154 Nassau street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas Kilvert, being duly sworn, deposes and says that he is one of the attorneys for the defendant in this action; that he has read the foregoing supplemental answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why the verification of said supplemental answer is made by deponent, and not by defendant, is that defendant is now absent from the county of New York, that being the county in which said defendant and his said attorneys respectively reside. Deponent further says that the grounds of his belief as to all matters not in said supplemental answer stated upon his own knowledge *is* derived from conversations had with defendant and from papers and documents in the possession of said attorneys relating to the subject-matter of the foregoing supplemental answer.

THOS. KILVERT.

Sworn to before me this 5th day of January, 1897.

FREDERICK C. ANDERSON,
Notary Public, N. Y. Co.

17 Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.
} Judgment, March 24, 1899.

This action having been called for trial in its regular order on the calendar of this court at a trial term (part VII) thereof held at the county court-house in the county of New York on the 21st day of March, 1899, before the Hon. Henry Bischoff, Jr., and a jury, the plaintiff appearing thereat by Otis & Pressinger, its attorneys, and the defendant appearing thereat by Porter & Kilvert, Esqs., his attorneys, and the jury under the direction of the court having rendered a verdict in favor of the plaintiff and against the defendant for the sum of four thousand nine hundred and sixty-seven $\frac{31}{100}$ dollars, and the plaintiff's costs having been duly taxed on notice at the sum of six hundred and ninety-seven and $\frac{62}{100}$ dollars, now on motion of Otis & Pressinger, the attorneys for the plaintiff, it is

Adjudged that the plaintiff Commercial Publishing Company recover of defendant Samuel C. Beckwith the sum of four thou-

sand nine hundred and sixty-seven $\frac{32}{100}$ dollars, the amount found by the jury as aforesaid, together with the further sum of six hundred and ninety-seven and $\frac{82}{100}$ dollars, plaintiff's costs as aforesaid, amounting in all to the sum of five thousand six hundred
18 and sixty-five and $\frac{14}{100}$ dollars and that the plaintiff have execution therefor.

[L. S.] WM. SOHMER, *Clerk*.

Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.

Case and Exceptions.

This action came on for trial before the Hon. Henry Bischoff, Jr., and a jury, at trial term (part VII) of this court on March 21, 1899.

Appearances.—For plaintiff, A. Walker Otis, Esq., of Otis & Pressinger. For defendant, Porter & Kilvert.

Mr. Otis opens the case on behalf of the plaintiff and offers in evidence the following agreed statement of facts:

Same received in evidence and marked Plaintiff's Exhibit I.

19 New York Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.

For the purposes of this action and in order to facilitate the trial thereof, the parties hereby agree that the following are the facts in this case, and the same may be read in evidence by either party upon the trial:

1. That the plaintiff is a foreign corporation, duly organized under the laws of the State of Tennessee, and engaged in the publication at Memphis in said State, of a newspaper known as the Commercial Appeal.

2. Prior to the 30th day of September, 1893, the Memphis Appeal Company, a corporation organized under the laws of the State of Tennessee, was engaged in the publication at said city of Memphis of a newspaper known as the Memphis Appeal-Avalanche.

Prior to the 30th day of September, 1893, the defendant had entered into a contract with said Memphis Appeal Company, which contract is contained in two letters dated January 3, 1891, of which the following are copies:

20 MEMPHIS, TENN., *Jan.* 3*d*, 1891.

S. C. Beckwith, 48 Tribune bldg., New York city.

DEAR SIR: In consideration of special efforts which you pledge yourself to make in our behalf to the best of your efforts and ability,

and furthermore, in consideration of allowing you nothing in the shape of salary, office rents or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1st, 1891, and sooner if possible, on a plain commission basis of twenty-five per cent. on all business for all that portion of the United States, north of a line running east and west with the southerly boundary of Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

All applications for rates, space, etc., from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent or advertisers, from your territory (which, however, is not contemplated), we will allow you the commission named upon same, and refer it to you for collection.

You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and, in event of that, you are simply to lose your commission, but not to be liable beyond that.

You are not to represent any other morning paper in the State of Tennessee or Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the Appeal-Avalanche.

MEMPHIS APPEAL-AVALANCHE COMPANY.
T. B. HATCHETT, *Bus. Manager.*

Accepted.
S. C. BECKWITH.

21 MEMPHIS, TENN., *Jan. 3rd*, 1891.

The Memphis Appeal Company, Memphis, Tenn.

GENTLEMEN: In consideration of a contract this day entered into by and between us, I hereby agree to advance to you thirty thousand dollars ($30,000.00), as follows:

$5,000 in cash on or before January 7th, $5,000 on or before the 12 of January 1891, then $5,000 on the 26th of January, 1891, to take up your note now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

The amount named of $30,000.00 to be loaned you on the Appeal Company's notes, endorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your company, and which stock shall not be increased without my consent during the term of this loan; neither shall any encumbrance be placed upon same.

Said loan and interest at six per cent. to be paid me in monthly installments by monies coming into my hands from the advertising in your paper, in amounts, say $1,000 per month, until paid.

S. C. BECKWITH.

O K.
MEMPHIS APPEAL COMPANY.
T. B. HATCHETT
(*Business Man'g'r*).

(Indorsed.)

As the debt is reduced I will surrender stock collateral *pro rata*.
S. C. BECKWITH.

Prior to September 30, 1893, the defendant had advanced money to said Memphis Appeal Company on said contract, and by reason thereof said Memphis Appeal Company was then indebted to
22 the defendant in an amount exceeding the sum of $20,000.00, and which has not been paid.

4. Prior to the 30th day of September, 1893, the defendant acting as the agent of the Memphis Appeal Company under said contract had obtained from the parties mentioned in Exhibit B, annexed to the complaint herein, orders for advertisements to be inserted in said Memphis Appeal-Avalanche for certain periods of time specified in the orders, which orders had been duly forwarded to said Memphis Appeal Company for execution.

5. On or about September 30, 1893, one Andrew D. Gwynne and others began an action (8852 R. D.) in the chancery court of Shelby county, Tennessee, against said The Memphis Appeal Company and others, to which action defendant herein was a party, the object of said action being to enforce a certain trust deed for the benefit of certain creditors theretofore made by said Memphis Appeal Company, a copy of which is hereto annexed, marked Exhibit A. On the 30th day of September, 1893, a decree was entered in said action appointing one William J. Chase, receiver of certain property and assets of said Memphis Appeal Company. A copy of said decree is hereto annexed marked Exhibit 1. Defendant was in Memphis, Tennessee, and was personally notified of said appointment prior to October 5, 1893.

6. Said receiver qualified under said decree of September 30, 1893, on the same day, and at once took possession of the property mentioned in said decree of said Memphis Appeal Company, and continued the publication of said Memphis Appeal-Avalanche from the 30th day of September, 1893, to the 16th day of June, 1894. He continued to act as such receiver all during the pendency of the various actions in which the decree of March 26, 1896, (Exhibit 7), was entered, as hereinafter referred to.

23 7. On October 5, 1893, defendant wrote said receiver a letter, a copy of which is hereto annexed marked Exhibit 1 A. On October 7, 1893, said receiver mailed to the defendant a notice, a copy of which is hereto annexed, marked Exhibit 2. Said letter was received by the defendant on or about October 10, 1893. On October 11, 1893, said receiver mailed to defendant and to each of the parties mentioned in Exhibit B, annexed to the complaint herein, a notice, a copy of which is hereto annexed and marked Exhibit 3. That thereupon defendant promptly notified the receiver in person that he repudiated all rights claimed by said receiver under said Exhibits 2 and 3.

8. Between September 30, 1893, and June 16, 1894, said receiver published in said newspaper certain advertisements for account of the various parties mentioned in Exhibit B, annexed to the com-

plaint herein, on orders arising our of said contract and delivered to said paper prior to September 30, 1893, the value of which advertisements as fixed by the rates mentioned in the orders so delivered to the Memphis Appeal Company as aforesaid, amounted to at least the various sums set opposite the names of the parties mentioned in said Exhibit B, and amounted in the aggregate to at least $3,902.74.

9. Claiming to act under said contract of January 3, 1891, the defendant has collected from the various parties mentioned in said Exhibit B, the sums set opposite their respective names at the dates mentioned in the margin thereof, amounting in the aggregate to the sum of $3,902.74. Said various sums were paid by said various parties in consideration of the publication of advertisements for their account in said Memphis Appeal-Avalanche between September 30, 1893, and June 16, 1894, as aforesaid, while said receiver was publishing said paper. Plaintiff subsequent to February 25, 1896, and prior
24 to the commencement of this action, demanded from the defendant the moneys so collected, but defendant has failed, omitted and refused to pay to the plaintiff said sums of money, or any part thereof, he claiming to hold the same by virtue of said contract of January 3, 1891, and claiming the right to hold said moneys for the purpose of applying same as part payment of his claim under the provisions of his letter of January 3, 1891, *supra*.

10. On or about the 5th day of October, 1893, a petition for removal to the circuit court of the United States for the western division of the western district of Tennessee was filed in said action of Andrew D. Gwynne *et al.* against The Memphis Appeal Company *et al.*, by said Samuel C. Beckwith on the ground that a separable controversy existed between the complainants therein and said Samuel C. Beckwith, and thereupon said chancery court of Shelby county Tennessee, and said circuit court of the United States for the western division of the western district of Tennessee acquired and exercised concurrent jurisdiction of said cause.

11. Thereafter a general creditor's action was brought in said chancery court of Shelby county, Tennessee, by Jacob Fink *et al.* against said Memphis Appeal Company for the purpose of winding it up as an insolvent corporation. Thereafter other creditors' actions were brought by unsecured creditors of said company. Thereafter a decree was duly entered in said court on November 6, 1893, a copy of which is hereto annexed, marked Exhibit 3 A. Thereafter, by an order duly entered in said court on January 19, 1894, all of said causes were consolidated. A copy of said order is hereto annexed, marked Exhibit 4.

12. Thereafter and during the month of April, 1894, decrees were simultaneously entered in said consolidated actions thus pending in the said chancery court of Shelby county, and in the action
25 then pending in the circuit court of the United States as aforesaid, appointing J. B. Clough and E. B. McHenry commissioners to sell, &c. A copy of the decrees thus entered in the said chancery court are hereto annexed, marked Exhibits 5 and 6. The decrees entered in the circuit court of the United States were to the same effect.

13. Thereafter and on the 16 day of June, 1894, said commissioners acting under the decrees aforesaid, sold at public auction in the city of Memphis the property aforesaid, and also all the right, title and interest of said receiver to the various sums set forth in Exhibit B annexed to the complaint herein, and in and to the claims of said receiver against the parties therein mentioned for said advertisements published by said receiver for their account in said Memphis Appeal-Avalanche between September 30, 1893, and June 16, 1894, as aforesaid, when and where same was struck off to one West J. Crawford, he paying therefor to said J. B. Clough and E. B. McHenry as such commissioners, the sum of $65,200, and he being the highest, best and last bidder therefor. That whatever title the receiver had to said sums set forth in Exhibit B was derived from said trust deed and his appointment as such receiver. On the 3d day of July, 1894, decrees were simultaneously entered in said actions thus pending in said chancery court of Shelby county, and said circuit court of the United States, confirming the sale.

14. At the time of the making of said various decrees said chancery court of Shelby county and said circuit court of the United States had jurisdiction of the subject-matter of said various actions and of the parties thereto.

15. On the 26th day of March, 1896, a final decree was entered in said consolidated causes, a copy of which is hereto annexed marked Exhibit 7.

16. Thereafter a portion of the defendants in said consoli-
26 dated causes prosecuted an appeal to the supreme court of the State of Tennessee, which is the court of last resort in said State, from said decree of March 26, 1896. Thereafter and on or about the 8th day of July, 1896, a decree or judgment was duly entered in the said supreme court of the State of Tennessee reversing in part and otherwise affirming the decree so appealed from. Said judgment of the supreme court of Tennessee was made the judgment of the chancery court of Shelby county by decree duly entered therein on July 8th, 1896, a copy of which is hereto annexed marked Exhibit 8. Said supreme court of the State of Tennessee was a court of competent appellate jurisdiction and had jurisdiction to review the decree so appealed from.

17. Prior to the commencement of this action said West J. Crawford duly assigned and transferred to the plaintiff all his claims, demands and rights of action against the defendant, which he acquired by virtue of the sale of June 16, 1894, above referred to.

18. The complaint herein is amended by striking out from the second paragraph thereof the words "the object of said action being to set aside a trust deed" and by inserting in lieu thereof the words "the object of said action being to enforce a trust deed."

Dated New York, April 14, 1898.

OTIS & PRESSINGER,
Attorneys for Plaintiff.
PORTER & KILVERT,
Attorneys for Defendant.

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EXHIBIT A.

Know all men by these presents, that this indenture made and entered into on this, the twentieth day of September, one thousand, eight hundred and ninety-three, by and between the Memphis Appeal Company, a corporation authorized and incorporated under and pursuant to the general incorporation laws of the State of Tennessee, and having its corporate situs and principal place of business in the city of Memphis, county of Shelby and State aforesaid, party of the first part, and Rob't J. Morgan and Andrew D. Gwynne as trustees, parties of the second part, and Holmes Cummins, Casey Young, W. J. Chase, Jos. Haines, John F. McCallum, L. B. McFarland, State National Bank, W. F. Taylor, Security Bank of Memhis, Union and Planters' Bank, and Bank of Commerce and Memphis City Bank, all being citizens and resident corporations of the said State, county and city, parties of the third part.

Witnesseth, that whereas, the party of the first part, the said Memphis Appeal Company, is indebted and otherwise liable and bound to the above-named parties of the third part, to the extent and in the manner which will be hereinafter more specifically stated and set out, that is to say, it is indebted to certain of the aforesaid parties of the third part as follows:

To Holmes Cummins in the sum of one thousand (1,000.00) dollars borrowed money, evidenced by its promissiory note for that amount made and executed on the 1st day of August, 1893, and payable ninety days after date to the order of W. A. Collier and by him endorsed.

To Casey Young in the sum of one thousand (1,000.00) dollars borrowed money, evidenced by its promissory note made and executed on the 1st day of August, 1893, payable ninety days after date to the order of W. A. Collier and by him endorsed, and

28 also in the further sum of $60, borrowed money, due on open account.

To W. J. Chase in the sum of one thousand five hundred dollars ($1,500), for money paid out and expended by him for and on behalf of the party of the first part at its instance and request, and in the further sum of sixty (60) dollars, borrowed money, all of which is due on open account.

To John F. McCallum in the sum of sixty dollars ($60.00), borrowed money, due on open account.

To L. B. McFarland in the sum of ($60) sixty dollars, borrowed money, and also due on open account.

All of which sums of money were advanced to the said party of the first part or paid out and expended at its request for the purpose of enabling it to carry on and prosecute its corporate business.

And the party of the first part is liable and bound to all of the aforesaid parties of the third part severally for such sums and such amounts of money as they or any of them may be compelled to pay respectively, as accom-odation endorsers, upon the following notes

for the payment of such of said notes as may have been made or held and owned by any of the said parties of the third part.

To Holmes Cummins as such endorser on three notes—the first being for the sum of twenty-one hundred (2,100) dollars, dated April 22d, 1893, payable four months from date to the order of B. M. Stratton and endorsed by him and W. A. Collier.

The second one being for the sum of twenty-two hundred ($2,200) dollars, dated June 25th, 1893, payable four months from date to the order of W. A. Collier, and endorsed by him and B. M. Stratton.

The third one being for the sum of twenty-one hundred ($2,100) dollars, dated July 25th, 1893, and payable September 8th,
29 1893, to the order of W. A. Collier, and endorsed by him and B. M. Stratton and also upon two other notes for six hundred and twenty-five dollars ($625), each dated July 22d, 1893—one of which is payable a- three months after date and the other one at four months after date to the order of W. A. Collier, and endorsed by him and said Holmes Cummins.

To Casey Young as endorser on a note for the sum of twenty-five hundred ($2,500) dollars, dated July 22d, 1893, and payable three month after date to the order of W. A. Collier and endorsed by him and B. M. Stratton.

To W. J. Chase as endorser on a note for twenty-five hundred ($2,500) dollars, dated March 29th, 1893, and payable at four months after date, to the order of B. M. Stratton at the Bank of Commerce.

To Jos. Haines as endorser or three notes for one thousand dollars ($1,000) each—the first one being dated April 22d, 1893, payable four months after date to the order of B. M. Stratton and endorsed by him and W. A. Collier.

The second one dated June 22d, 1893, payable four months after date to the order of W. A. Collier and endorsed by him and B. M. Stratton.

The third one, dated July 25th, 1893, payable three months after date to the order of W. A. Collier and endorsed by him and B. M. Stratton.

To John F. McCallum, as maker of a note for twelve hundred and fifty ($1,250) dollars, dated July 31st, 1893, payable ninety days after date to the order of W. A. Collier and endorsed by him and L. B. McFarland, and which note was delivered to the party of the first — for its accom-odation, and which was discounted by it and the proceeds thereof use- for its benefit in the prosecution of its corporate business.

To Memphis City bank the holder and to T. B. Hatchett, as endorser on note for seven thousand ($7,000) dollars, dated May 24th, 1893, payable sixty days after date to the order of B. M. Stratton.

30 To W. F. Taylor as endorser on note for fifteen hundred ($1,500) dollars, dated June 17th, 1893, payable three months after date to the order of W. A. Collier and endorsed by him and O. P. Bard.

To the State national bank, as the owner and holder of a note for twelve thousand ($12,000) dollars, dated June 25th, 1893, payable two months after date to the order of W. A. Collier, and by him endorsed,

and also as the holder of a note for five hundred ($500) dollars dated July 3d, 1893, due sixty days after date and endorsed by J. J. Williams.

To L. B. McFarland, as endorser on note for one thousand dollars ($1,000), dated August 7th, 1893, payable ninety days after date to the order of J. M. Trezevant and endorsed by him, W. A. Collier and G. C. Matthews, and also as endorser on an accom-odation note for twelve hundred and fifty ($1,250) dollars made by John F. McCallum, dated July 31st, 1893, payable to the order of W. A. Collier and endorsed by him.

To the Security Bank of Memphis, as the owner and holder of a note for twelve thousand, five hundred ($12,500) dollars, dated June 12th, 1893, payable thirty days after date to the order of W. A. Collier and endorsed by him and B. M. Stratton and R. D. Frayser.

To the Union & Planters' bank, as the holder and owner of a note for seven hundred and sixty-five ($765) dollars, dated June 3d, and due sixty days after date and endorsed by J. J. Williams.

To the Bank of Commerce as the owner and holder of a note for five hundred ($500.00) dollars, dated July 13th, 1893, payable ninety days after date, to the order of W. A. Collier, and endorsed by him and Cæsar Weatherford.

All of the foregoing and the above-described notes having been made, executed and delivered for value by the party of the first part (except the note for twelve hundred and fifty ($1,250.00) dol-
31 lars made by John F. McCallum hereinbefore named), the parties of the third part being only accom-odation endorsers thereon.

Now, therefore, the party of the first part for the purpose of securing and making certain the payment of the before-mentioned sums of money advanced, paid out, and expended for and on its account to enable it to prosecute and carry on its corporate business as aforesaid with lawful interest thereon, and to secure the payment of the other notes hereinbefore mentioned, and to indemnify and save harmless the parties of the third part against any loss or damage which they or any of them, may sustain, by reason of being the makers, holders, or accom-odation endorsers on the last before-mentioned notes, and for the further purpose of indemnifying them against any liability not exceeding twenty-five thousand (25,000.00) dollars which may be incurred by them or by the trustees hereinbefore named under their direction and approval and in making more valuable the trust property herein conveyed until it is disposed of under the subsequent terms and conditions of this instrument, and for the still further consideration of one dollar ($1.00) to it in hand paid by the parties of the third part, the receipt of which is hereby acknowledged, the party of the first part, the said Memphis Appeal Company, hereby sells and conveys to the party of the second part as trustees, the Memphis Appeal-Avalanche newspaper owned and now being published in the city of Memphis by the said party of the first part, with all of the rights, privileges, benefits, franchises, etc., belonging to or in any way pertaining to the same, which can be lawfully conveyed, together with its good will, subscription list,

advertising patronage, income and profits, and all the machinery, fixtures, appliances, furniture, material, properties, assets, etc., of every kind and character, consisting of presses, stereotyping apparatus, electros and general outfit of said newspaper, excepting
32 and excluding, however, from this conveyance the book of accounts and unexpired contracts of said paper made previous to the first day of January, 1891.

The trustees hereinbefore named, the said R. J. Morgan and Andrew D. Gwynne, are hereby vested with full and complete legal title to all the property above described and herein conveyed, and they are also hereby fully authorized and empowered to take immediate possession of the same and manage and control it in every respect as they may deem best, free from any sort of interference by the party of the first part or any of its officers or agents, subject, however to the direction and approval of a majority of the parties of the third part. And subject also to the same direction and approval they are authorized to expend any sum of money not exceeding twenty-five thousand ($25,000.00) dollars in preserving and enhancing the value of the trust property, if, in their judgment and that of a majority of the beneficiaries herein, such expenditure is necessary to secure and protect the interests of all the parties concerned in said property until it shall be released from the lien of the trust deed in the way and manner hereinafter provided.

And the party of the first part hereby expressly stipulates and agrees that if all the money advanced, paid out, and expended for and on its behalf by the before-mentioned parties of the third part, and if the before-described indebtedness and notes shall not be fully paid, or the said parties of the third part are not relieved of all liability as holders and owners of said notes or as accom-odation endorsers on such of them as they have endorsed by the payment of the sum or in some other way satisfactory to them within six months from the date hereon, then the said trustees may sell the property herein conveyed to them for cash at public or private sale for the highest price they may be able to obtain. If they shall find an opportunity to sell all or any part of said property at
33 a private sale for such price as may be deemed adequate by them and a majority of the beneficiaries, then they shall make such sale without giving any public notice thereof, but they shall not accept a less price than a majority of the parties of the third part may think the property or any part thereof offered for sale is worth. But if they shall sell at public sale, then they shall make the same in front of the Jefferson Street entrance to the Appeal building in the city of Memphis, Tennessee, at public outcry, after giving thirty days' notice through some newspaper published in the city of Memphis, of the time, terms and place of said sale. It is further stipulated and agreed, however, by the party of the first part that if the said trustees or a majority of the beneficiaries herein shall find that the expense of publishing and conducting the said Appeal-Avalanche newspaper, and that the damage and depreciation in the value of the property herein conveyed will be so great by further delay as to destroy or materially injure the

security herein intended to be given, then the said trustees at the direction of a majority of the beneficiaries shall sell the property embraced herein at any time at public or private sale for cash, with or without notice, as they, the beneficiaries, may direct.

And it is also stipulated and agreed that in case the property herein described shall be sold under any of the conditions aforesaid, the proceeds arising from said sale shall be appropriated as follows:

First. To the payment of any expenses which may be incurred by the before-mentioned trustees in making same.

Second. To the payment of any sum or sums of money which may be paid out and expended by said trustees under the direction of a majority of the beneficiaries herein to preserve and ren-
34 der more valuable the property here conveyed as provided in a former part of this instrument.

Third. To the payment of the moneys advanced paid out and expended on behalf of the party of the first part by Holmes Cummins, Casey Young, W. J. Chase and L. B. McFarland, amounting to the sum of thirty-eight hundred ($3,800) dollars so paid out and expended by the parties last aforesaid, and to the payment of the accom-odation note for twelve hundred and fifty ($1,250) dollars made by John F. McCallum, dated July 31st, 1893, endorsed by L. B. McFarland, and due ninety days from date. It being the purpose and intention that all of the above-mentioned indebtedness and sums of money shall be a first and paramount lien upon all the properties herein conveyed.

Fourth. To the payment *pro rata* of the other notes hereinbefore enumerated, held and owned by the parties of the third part, or any sum or sums of money which any of the said third parties may be compelled to pay or remain liable for by reason of being accom-odation endorsers thereon.

Fifth. If any part of the proceeds arising from the sale of said property shall remain in the hands of the trustees after making the payments above provided for, the same shall be paid over to the party of the first part or any one of its officers or agents authorized to receive and receipt for same.

In case all the debts and obligations herein provided for are fully paid off and discharged or otherwise arranged to the satisfaction of the beneficiaries then the property embraced herein shall be reconveyed by the aforesaid trustees to the party of the first part and this conveyance shall be null and void; otherwise it is to remain in full force and effect subject to all the conditions which it contains.

It is also stipulated and agreed that if either of the before-
35 mentioned trustees shall die, resign or refuse to serve, then a new trustee or trustees to take their places may be appointed by a majority of the beneficiaries herein, who, when appointed, shall be clothed with all the rights and powers of the trustees already named. And said trustees before appointed and provided for may use and appropriate the income and profits of the aforesaid properties to the payment of the debts and obligations herein secured in the order and manner before directed.

The making of oath and giving bond by the aforesaid trustees, as required by a statute, is expressly waived and assented to by all the parties to this conveyance.

In witness whereof, the party of the first part has caused this instrument to be signed by its proper officer and sealed with its corporate seal on this, the — day of September, 1893 A. D.

(Signed) THE MEMPHIS APPEAL CO.,
By W. A. COLLIER, *Pres.*

Attest: JAS. S. MAHAFFY, *Sec.*

STATE OF TENNESSEE, }
County of Shelby. }

Be it remembered: That on this, the 21st day of September, 1893, personally appeared before me, Robert M. Beattie, a notary public, within and for said — and State, duly qualified and acting as such, the within-named bargainor, The Memphis Appeal Co., by its president, Wm. A. Collier, and its secretary, James S. Mahaffy, personally known to me to be such president and secretary respectively, with each of whom I am personally acquainted, and who severally acknowledged that they executed the within instrument for
36 the purposes therein contained in behalf of said The Memphis Appeal Company, and also as their own free act and deed. And the said Mahaffy, secretary, stated and acknowledged that he attached thereto the corporate seal of said company, by authority and direction of its board of directors.

Witness my hand and notarial seal at my office in Memphis, Shelby county, Tenn., this Sept. 21st, 1893.

(Signed) ROB'T M. BEATTIE,
Notary Public.

EXHIBIT 1.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis on the 30th day of September, 1893.

Present: Hon. William D. Beard, chancellor.

ANDREW D. GWYNNE ET AL. }
vs. } Decree Appointing Receiver. R. D. 8852.
THE MEMPHIS APPEAL COMPANY ET AL. }

The cause was heard on the application of the complainant for the appointment of a receiver before the Hon. W. D. Beard, chancellor, at chambers, and upon consideration hath the court is pleased to grant the prayer of the bill; and the parties in interest agreeing that William J. Chase is a suitable person, the court is pleased to appoint him a receiver of all the property mentioned and
37 described in the bill of complaint and upon the executing a bond in the penalty of $25,000, to be approved by the clerk and master, conditioned for the faithful performance of the trust in him reposed, — is hereby authorized to take possession of the property described in the trust deed mentioned in the bill, with full

power and directions to continue the publication of the daily and weekly Memphis Appeal-Avalanche; and to the end that he may preserve, manage, operate and build up the trust property, he is vested with authority to pay the current expenses of the publication of the said paper, and to collect each and every of the several assets conveyed to the trustees, Gwynne and Morgan, and to do and perform everything that is requisite and necessary for the administration of the said trust and the publication of the said paper as will be most conducive to the interests of the parties.

But of the moneys which come into his hands he will pay without further order.

No. 1. The current expenses of the publication of the daily and weekly Memphis Appeal-Avalanche and the expenses incurred in preserving the trust property.

No. 2. The several amounts advanced by Andrew D. Gwynne and Robert J. Morgan, trustees, and expended in the publication of the said paper and in preserving the trust property since the execution of the trust deed.

And to the end that the receiver may be enabled to administer the trust herein, he is directed and empowered to issue from time to time, and only when necessary, his certificate of indebtedness in such amounts as may be deemed proper, not exceeding $25,000 in the aggregate, to be numbered from one consecutively up to and inclusive of the last certificates issued, each certificate to express on its face the limitation in amount of the whole issue as above, viz: $25,000; and the certificates so issued are, as are now and
38 here declared to be, a first and paramount lien on all of the trust property and the earnings derived from its operation.

The receiver will file at his own convenience an inventory of the trust property, and will file monthly statements herein showing in detail his receipts and expenditures, each item of expenditure to be accompanied by a voucher. He will apply from time to time to the court for such instructions as he may require in the administration of his trust, and if at any time he requires the advice of counsel he will submit to the court the advisability of encumbering the trust property with counsel fees.

And it further appearing to the court that the defendants The Sabine-Robbins Paper Co., The National Cash Register Co., The Dupont Paper Mill Co., The Rochester Paper Co., C. P. J. Mooney and E. Whitmore, from the statement made by Mr. T. B. Turley, one of their solicitors, in open court, that they severally have executions in the hands of the sheriff against the Memphis Appeal Company, upon their application the court is pleased to order that the appointment of a receiver herein shall in nowise effect their several rights, if any they have, to cause the sheriff of Shelby county to levy their executions on the property of which the receiver is directed to take possession; but if said levy shall be made, the property levied on will be left in the custody of the receiver as agent for the sheriff until the validity of such levy is determined. Nothing in this order determines in any way the validity of said executions or any levies made thereon.

WILLIAM D. BEARD, *Chancellor.*

39 EXHIBIT "1 A."

In the Chancery Court of Shelby County, Tenn.

ANDREW D. GWYNNE and ROBERT J. MORGAN
vs.
MEMPHIS APPEAL CO. ET AL. } R. D. No. 8852.

To William J. Chase:

You will please take notice that the above-styled suit has this day been removed from the chancery court of Shelby county, Tenn., to the circuit court of the United States for the western division of the western district of Tennessee, at Memphis where it is now pending; and that no further proceedings can be had in the said suit in the said chancery court. You informed me on Tuesday last that you intended to send out a circular to advertising agents and my advertising customers, to the effect that owing to a change in the management of the Appeal Company you would receive orders from them direct in future, and that I, who have heretofore acted as the special agent of the Memphis Appeal Company, would no longer have exclusive control of the advertising business heretofore entrusted to me. You have also taken from the heading of the editorial column of the Appeal-Avalanche the notice heretofore appearing therein, that the eastern office of the Appeal-Avalanche was room 48, Tribune building, New York, and 509 Rookery building, Chicago, and that I was the special eastern agent of the said paper.

40 And the attorneys advising you have written me that they have advised you that in the operation of the Appeal-Avalanche you are in no way bound by my contract with the Memphis Appeal Company, and that you should collect all the revenues of the paper arising from the publication of advertisements in the territory mentioned in the Memphis Appeal Company with me, and that all contracts of agency or employment made with the Appeal Company as to the newspaper are now terminated, and that any one seeking to do business with the paper must make new contracts with you, who have unlimited authority in the matter. And you have informed me that you have received such advice and proposed to be governed by it in your conduct of the business of the said newspaper. And you have informed me in addition that you would not recognize the contract between the Memphis Appeal Company and myself as of any validity whatever, and that you considered it cancelled and abrogated and of no force. Now, this is to notify you that the contract between the Memphis Appeal Company and myself, of date January 3d, 1891, and which you have heretofore seen and read, is in full force and effect, and that I shall insist on its full performance in every respect by the Memphis Appeal Company, and by you and by all others who undertake in any respect whatever to represent or act for that company, or who has the management or control, or undertakes to manage or control its assets or property, or any part of them, or who undertakes to conduct or control the publication of

the said newspaper, the Memphis Appeal-Avalanche. And I further notify you that I shall hold you personally responsible in damages for any interference by you, by letter, word or otherwise, with the full and complete execution of the said contract, in every respect according to its true intent and meaning, and that the circular referred to, and the withdrawing of the notice mentioned above
41 from the head of the editorial column of the Memphis Appeal-Avalanche, and all like acts or interferences *with* are breaches of the said contract, and are calculated to do me great injury, and that I hold you responsible for the consequences of all such acts.

S. C. BECKWITH.

MM. M. RANDOLPH & SONS,
PORTER & KILVERT,
Attorneys and Counsels for Mr. Beckwith.

EXHIBIT 2.

MEMPHIS, TENN., *Oct. 7th*, 1893.

In the Chancery Court of Shelby Co., Tennessee.

ANDREW D. GWYNNE ET AL.
vs.
THE MEMPHIS APPEAL CO. ET AL.

To S. C. Beckwith:

In the matter of the notice from you of date Oct. 5th, 1893, addressed to myself, I beg to advise you that I am in charge of the business and property of the newspaper, the Memphis Appeal-Avalanche only as receiver under appointment in the above-styled cause by the chancery court above named. As such in the conduct of said business, I am advised that it is my duty while carrying out such advertising contracts as were in course of completion in the current publications of said paper, whether made by said company through you as agent or directly with advertisers yet that as to all matters appearing in said paper from and after my appointment, it was likewise my duty to secure to the trust estate of which I am receiver all the revenues therefrom.

Therefore, and to this extent as I am advised I cannot
42 recognize any contract you may have had with said company giving you control of such business or the revenues therefrom, your right thereto according to the information I have, being but a floating and unsecured claim or debt against said company and not a lien upon the trust estate of which I am the receiver. If I am in error as to any fact as above stated, I should be glad to have correction at once. I need hardly advise you that I do not represent the Memphis Appeal Company, nor is it affected in any way by what I may do.

Yours respectfully, W. J. CHASE, *Receiver.*

EXHIBIT 3.

MEMPHIS, TENN., *Oct.* 11, '93.

Mr. S. C. Beckwith, Tribune building, New York city.

DEAR SIR: All the business and properties of the daily and weekly Appeal-Avalanche have been placed in the hands of W. J. Chase, as receiver under appointment as such by the honorable chancery court of Shelby county, Tennessee, in the cause of Andrew D. Gwynne and others against the Memphis Appeal Company and others. There will be no interruption in the current business of the paper excepting only that all business will be hereafter handled and collections made by the receiver direct, instead of passing through the hands of Mr. S. C. Beckwith, who has acted as general agent of the Memphis Appeal Company, with offices in Chicago and New York.

Yours truly,

O. P. BARD,
Manager for the Receiver.

P. S.—The above letter has been mailed to advertisers and advertising agencies. Please govern yourself accordingly.

43 EXHIBIT 3 A.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis, on the 6th day of November, 1893.

Present: Hon. William D. Beard, chancellor.

JACOB FINK ET AL. *vs.* MEMPHIS APPEAL CO. ET AL. } 888 R. D. Orders Sustaining Bill as General Creditors' Bill, etc.

This cause came on to be heard this day upon motion of the complainants for leave to make W. J. Chase the receiver appointed by this court heretofore in the several causes, a party defendant in this cause, which being considered by the court, is overruled. And the bill on this cause having been read by the court and it appearing to the court that it is filed on behalf of complainant and all the other creditors of the Memphis Appeal Co., it is ordered by the court that the bill be sustained as a general creditors' bill and stated as a general creditors' bill, and as such inure to the benefit of all creditors who may claim its benefits or may come in under it. And the clerk and master is ordered to make publication in some newspaper published in the city of Memphis, notifying all the creditors of the Memphis Appeal Co. of the filing of the bill in this cause, and requiring them to come in by petition and file and prove their respective claims against said Memphis Appeal Co. on or be-
44 fore the (15) fifteenth day of May, 1894, or they may be excluded from the benefits of this proceeding.

And on motion of complainants, the institution of any separate

suits by any of said creditors or claimants is hereby enjoined, and the master will so state in said publication notice.

All creditors filing petitions in this cause will execute and file proper prosecution bonds or take the pauper oath in lieu thereof.

Such petitions may be filed without further leave than this order.

WILLIAM D. BEARD, *Chancellor.*

45 EXHIBIT 4.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis, on the 19th day of January, 1894.

Present: Hon. William D. Beard, chancellor.

A. D. GWYNNE ET AL. *vs.* MEMPHIS APPEAL CO.	8852.	Order of Consolidation.
CHRIS HETTINGER *vs.* MEMPHIS APPEAL CO.	8851.	
JOHN FINK ET AL. *vs.* MEMPHIS APPEAL CO.	8888.	
JAMES MYRIOK *vs.* A. D. GWYNNE ET AL.	8870.	

This cause coming on to be heard on the motion of the complainants in the case of A. D. Gwynne *et al. vs.* Memphis Appeal Co. *et al.* for a consolidation of all of the above-styled causes, and it appearing to the court that these causes should be consolidated and that all of the complainants in the several causes consenting thereto, it is ordered that the several causes be and the same are
46 hereby consolidated, but the right of the complainants to appeal from the decree on demurrer in Hettinger *vs.* Memphis Appeal Co., No. 8851, R. D., is to be in no manner affected by the entry of this decree, he having the right to take this case to the supreme court just as though this decree had not been entered.

WILLIAM D. BEARD, *Chancellor.*

EXHIBIT 5.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis, on the 6th day of April, 1894.

Present: Hon. William D. Baird, chancellor.

A. D. GWYNNE ET AL. vs. MEMPHIS APPEAL CO. ET AL.	8852 R. D.	Decree of Sale.
J. B. MYRICK ET AL. vs. D. D. GWYNNE ET AL.	8870 R. D.	
JACOB FINK ET AL. vs. MEMPHIS APPEAL COMPANY ET AL.	8888 R. D.	

In these causes, which have heretofore been duly consolidated, came on, on this 6th day of April, 1894, before his honor,
47 W. D. Beard, chancellor, etc., to be further heard, the motion of the several complainants, except cross-complainant Jas. B. Loring, for a sale of the newspaper, the Appeal-Avalanche, and properties in the hands of the receiver herein; when it appearing to the court that the defendants under the leave given by the order and decree rendered herein at the last term, to wit, the 26th day of March, 1894, to within ten days from that date nominate some suitable and proper person as receiver, to take the place of W. J. Chase, as receiver, etc., herein, have failed to suggest or nominate any other person as such receiver. And the court being of opinion, as hereinbefore adjudged, that because of the insolvency of the defendant The Memphis Appeal Company, as well as because that the business of conducting the newspaper, the Memphis Avalanche, and its publication and the property in the hands of the receiver herein has been and is not self-supporting, and that the earnings, income and profits thereof have been and are insufficient to meet and defray the cost and expense incident thereto, and that the value of said newspaper and property and the security of the complainants' creditors, etc., has been and is being deteri-rated and lessened under its contract by this court through its receiver, in that the necessary cost and expense thereof exceeds its income and earnings.

That (for these several reasons) it is to the manifest interest of all the parties that said newspaper and property should be sold. It is therefore accordingly so ordered, adjudged and decreed.

It is, therefore, further ordered, adjudged and decreed that the receiver, W. J. Chase, after first advertising the time, terms and place of sale, for a period of thirty days, in one or more newspapers, published in the city of Memphis, do proceed to sell the Memphis Ap-

peal-Avalanche newspaper, with all the rights, privileges, benefits, franchises, etc., belonging to or in any way pertaining to
48 same, together with its good will, subscription list, advertising patronage, income and profits, and all the machinery, appliances, furniture, material, property, assets, etc., of every kind and description and the general outfit of the newspaper now in the hands of the receiver in these causes.

He will sell all and every kind and description of property in his hands, saving and except the uncollected book accounts of the Memphis Appeal Co. accruing prior to his appointment as receiver, and which were placed in his hands for collection. Such of these accounts as remain uncollected will not be sold.

All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same. And such purchaser will take the property decreed to be sold herein, subject to all of the contract obligations incurred by the receiver, and will assume the payment of same, including any amount due the receiver on the day of sale for overchecks made by him for personal advances on account of the property in his hands. Excepting only the certificates issued by the receiver for the payment of which the purchaser shall in no way be liable.

He will sell said property at public outcry to the highest bidder at the front door or Main Street door of the Appeal building at the corner of Main and Jefferson streets, in Memphis—and on the following terms—that is a cash payment of fifteen thousand dollars, and the balance on a credit of one and two years, taking from the purchaser two notes equal in amount with good sureties bearing interest from date and retaining a lien on the property sold for the purchase price.

The purchaser shall pay to the receiver upon the acceptance of his bid, instanter, $5,000, five thousand dollars, or his bid shall
49 be ignored, and the sale proceeded with as if his said bid had not been made.

The purchaser shall proceed forthwith to comply with the terms of his bid as provided by this decree, and if he fail so to do, the said sum of $5,000, advanced by him shall be forfeited and become a part of the fund in the hands of the receiver; and the receiver shall resell the property.

The receiver will offer the iron safe separately, selling same for cash.

The receiver will report all proceedings under this decree of the court.

The purchaser at the sale herein ordered will acquire the absolute title to all the property decreed to be sold, free from all claims, liens, and encumbrances whatever, save as provided above as to the contract obligations of the receiver; and the proceeds of sale will stand in these causes in lieu and place of the property itself.

All questions as to the distribution of the proceeds of sale are re-

served for further decree. Exceptions to this decree and all parts thereof are reserved by the Memphis Appeal Co.

WILLIAM D. BEARD, *Chancellor.*

50 EXHIBIT 6.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis, on the 30th day of April, 1894.

Present: Hon. William D. Beard, chancellor.

A. D. GWYNNE ET AL. *vs.* MEMPHIS APPEAL CO. ET AL.	8852 R. D.	Decree Amending Decree of Sale of April 6, 1894.
J. B. MYRICK ET AL. *vs.* A. D. GWYNNE ET AL.	8870 R. D.	
JACOB FINK ET AL. *vs.* MEMPHIS APPEAL CO. ET AL.	8888 R. D.	

In these causes so much of the decree of sale rendered herein at a former day of this term, viz., the 6th day of April, 1894, and entered on page 605 of Minute Book 86, as authorizes and directs W. J. Chase the receiver of the newspaper the Appeal-Avalanche and other properties to make the sale thereof as also in said decree set forth is now set aside on motion of the defendant Memphis Appeal Company, and J. B. Clough and E. B. McHenry, are now and hereby appointed special commissioners of this court for the making of said sale as ordered and decreed in said former
51 order herein, and it is ordered, adjudged and decreed that said E. B. McHenry, who is the clerk and master of this court, and J. B. Clough, who is the clerk of the circuit court of the United States in this county, as such commissioners be clothed with all the powers and charged with all the duties that were by said former decree herein conferred or charged upon the said W. J. Chase, and they will, as such commissioners, proceed to execute said decree of sale. In making the motion not to have said sale made by W. J. Chase, receiver, &c., the Memphis Appeal Co. does not waive any right or equity which it may have, to resist said sale, but on the contrary, reserves all grounds of exception and objection thereto as fully as if said motion had not been made.

WILLIAM D. BEARD, *Chancellor.*

52 EXHIBIT 7.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house in the city of Memphis, on the 26th day of March, 1896.

Present: Hon. William D. Beard, chancellor.

A. D. GWYNNE ET AL. *vs.* MEMPHIS APPEAL CO. ET AL. } 8852 R. D.

and

JACOB FINK ET AL. *vs.* MEMPHIS APPEAL CO. ET AL. } 8888 R. D.

and

J. B. MYRICK ET AL. *vs.* MEMPHIS APPEAL CO. ET AL. } 8870 R. D.

and

CHRIST. HETTINGER *vs.* MEMPHIS APPEAL CO. ET AL. } 8851 R. D.

} Final Decree.

These consolidated causes came on to be finally heard upon the pleadings, orders and proof on file herein.

And the court is of opinion, and adjudges and decrees
53 that the deed of conveyance by W. A. Collier and Alice T. Collier, dated June 7th, 1892, conveying to the Memphis Appeal Company the lot of land and building thereon, known as the Appeal building, on the southwest corner of Main and Jefferson streets, in Memphis, Shelby county, Tennessee, 74½ feet on Main street by 105 feet on Jefferson, was valid and operated to vest title to said property in the Memphis Appeal Co. subject to the incumbrances upon the said land at the time of the execution of the said conveyance. That the deed of trust executed on June 7th, 1892, by the Memphis Appeal Co., to the Memphis Trust Co., to secure the 200 bonds for $1,000 each of that company, the same being a part of the purchase-money in said Appeal building, covered all the property of the Memphis Appeal Company, including the newspaper and the newspaper's good will, etc., and was valid and binding upon the Memphis Appeal Company. That thereafter these bonds were pledged by W. A. Collier one hundred of them with the Memphis Trust Co., under an agreement that the proceeds of same should be used in paying the indebtedness of the Lombard Investment Co.,

secured by a prior trust deed on said property, and after payment of same to be applied to the extinguishment of any other incumbrances on said above-described property, and then to the indemnity of W. F. Taylor as an endorser on a certain note for $6,500.00 described in said agreement; at the same time fifty of said bonds were pledged by W. A. Collier with the Memphis Trust Co., as collateral to a loan to him of $30,000.

Shortly thereafter forty of these were pledged by W. A. Collier as collateral to a loan from the Jennings Trust Company to him of $28,000, and the remaining $10,000 were deposited by W. A. Collier as collateral security in some manner, with the Security Bank of Memphis.

The court is further of the opinion, and so orders, adjudges and decrees upon the facts in these causes, that said two hundred
54 bonds of $1,000 each are discharged and satisfied as an indebtedness of the Memphis Appeal Co., and that James B. Loring has acquired the valid title to the building at and for the price of $200,000, the face value of said bonds, subject to all the prior liens and the claims thereon, and charged with the liability to pay the debts as hereinbefore set out, for which said two hundred mortgage bonds of the Appeal Co., *well* pledged as collateral, so far as the same may remain unpaid and be due, according to the terms of the contract by which they were pledged. All relief asked for by James B. Loring in his cross-bill, except as herein granted, is denied, and the cross-bill is dismissed at the cost of the said Loring.

The court is further of the opinion that the receiver in these causes was not liable for rent to any person by reason of his occupancy of a portion of the Appeal building, and accordingly orders, adjudges and decrees that the purchaser W. J. Crawford, is not liable to Mrs. Alice T. Collier, for any claims of rent arising from this source, and her petition seeking to recover same is dismissed.

The court is further of the opinion that no lien was fastened on any of the assets of the Memphis Appeal Company by the levy of the execution in the case of Foley-Williams, Mfg. Co. *et al. vs.* Memphis Appeal Co. *et al.*, and therefore dismisses the cross-bill of S. C. Beckwith, at the cost of the said Beckwith, and the petition of Lawrence Lamb, filed in the case of Fink *vs.* Memphis Appeal Co., in so far as it claims any lien upon the fund in court; but adjudges the said Lamb to be a general creditor unsecured of the Memphis Appeal Co., to the extent of any sums which he may have paid out on behalf of the Memphis Appeal Company, in satisfying the judgment in said cases.

The cross-bill of Mrs. Iris C. Ryder, filed in the case of Jacob Fink *et al. vs.* Memphis Appeal Co. *et al.*, is likewise dismissed in so far as it claims any lien upon the fund in court, but she is de-
55 clared to be a general unsecured creditor of the Memphis Appeal Co. for the amount of her judgment, with interest.

And it further appearing that on September 20th, 1893, the Memphis Appeal Co. executed a deed of trust on its property, the Memphis Appeal-Avalanche newspaper, with all of its assets, good will, etc., to A. D. Gwynne and R. J. Morgan, as trustees, to secure certain

persons in amount hereinafter mentioned, the proceeds of which property constitute the fund now in the registry of this court, and that this deed of trust has upon demurrer in these causes been adjudged valid on its face, the court is of opinion that the said deed of trust was executed for the purpose of enabling the Memphis Appeal Company to proceed with the prosecution of its business, and to keep it a going concern, and is a valid and binding encumbrance upon the assets therein conveyed.

And the court being of opinion that all the debts mentioned in the said deed of trust are lawful and valid debts of the Memphis Appeal Company, it is therefore ordered adjudged and decreed that the several beneficiaries named in the said deed of trust do have and recover of the Memphis Appeal Company, the following amounts, respectively:

Holmes Cummins, the sum of	$10,051 50
Casey Young, the sum of	4,035 00
W. J. Chase, the sum of	4,652 50
Joseph Haines, the sum of	3,500 00
John McCallum, the sum of	1,447 00
Memphis City Bank, the sum of	8,111 47
W. F. Taylor, the sum of	1,747 50
State National Bank, the sum of	13,838 00
L. B. McFarland, the sum of	1,134 00
Security Bank, the sum of	14,508 33
Union and Planters' Bank, the sum of	893 80
Bank of Commerce, the sum of	582 00

But it *is* further appeared, that the said Security Bank, has
56 recovered from W. A. Collier, one of the endorsers on the note secured by the deed of trust the sum of $5,000 on September 21, 1893, it is ordered that in the distribution of the trust fund hereinbelow ordered the said bank shall receive its *pro rata* on the basis of the judgment above rendered up to or until it is paid the sum of $8,841.25, with interest, until paid the amount now due after crediting the above judgment with the sum of $5,000, and after paying the attorneys as hereinafter adjudged in full, W. A. Collier and Joe Haines, his assigns are denied any right of subrogation by reason of the payment of $5,000.

And it further appearing that the two notes in favor of the Memphis City Bank and the Security Bank of Memphis, secured by the said deed of trust, and on which judgment is hereinabove given, provides for the recovery of the attorneys' fees in the event of litigation with the Memphis Appeal Co. in the collection of said notes; and it appearing that this litigation has ensued and judgment has been recovered herein, the court is of opinion that the Memphis City Bank and Security Bank of Memphis are entitled to recover reasonable attorneys' fees in this cause against the Memphis Appeal Company, and a reference is here ordered to the clerk and master to ascertain and report the reasonable attorneys' fees for such service.

Such sums as shall be determined upon such reference will become a part of the indebtedness secured by said deed of trust, upon which

the said banks will be allowed a *pro rata* in the distribution by the said trustees.

It is further ordered, that the entire fund in court in these causes, saving and except the provisions herein made for the complainants in the bill of J. B. Myrick *et al. vs.* A. D. Gwynne *et al.* and The Memphis Appeal Co. and saving and except costs which are ordered to be first paid, *to* be paid over to A. D. Gwynne and R. J. Mor-
57 gan, trustees, or their solicitors of record, Cummins & Percy, to be by them distributed in accordance with the provisions and priorities of the trust deed to them.

A lien is declared in favor of said Cummins & Percy upon said fund for their fees as solicitors for the said trustees and complainant in said cause.

A reference is ordered to determine the compensation which should be allowed A. D. Gwynne and R. J. Morgan and Cummins & Percy for their services on behalf of the trust which they have represented.

But before the said fund is so paid out *of* the debts sued on in the bill of J. B. Myrick *et al. vs.* Memphis Appeal Co., must be paid without interest — of said fund, the court being of opinion (and the counsel for said A. D. Gwynne *et al.* having stated in open court at the argument that they admitted same) that such complainants who were laborers on the Memphis Appeal-Avalanche had a prior lien to the said deed of trust, for wages due them for work and labor done within three months prior to the filing of said bill.

The petitions of T. D. Taylor and Lawrence Lamb, filed in Fink *et al. vs.* Memphis Appeal Co. *et al.*, are dismissed because they have no lien as employees on the fund in court, but they are declared to be general unsecured creditors of said Appeal Company.

And it appearing to the court that the following are the parties who filed the bill in the case of J. B. Myrick *et al. vs.* A. D. Gwynne *et al.*, No. 8870, R. D., and that the following are the amounts of their claims respectively, for services as employees upon and for the newspaper, the Appeal-Avalanche, for which a lien exists upon the proceeds of the property sold herein, and otherwise, as herein decreed, viz:

J. B. Myrick	$43 60
J. H. Harris	16 90
Ed. M. Wright	23 00
58 Jos. Crabb	23 30
W. A. McVey	25 60
Walker Wood	3 60
W. H. Johnson	124 75
Hugh H. Huhn	67 68
Porter Colhouer	27 15
M. W. Connolly	2 25
Burton Connolly, Jr	5 00
Walker Kenneday	281 04
Thos. Madden	46 26
James Parker	66 85

Andrew Whitley	8 60
Mrs. L. H. Jones	35 00
John H. Lee	11 87
Amie Aeschelman	7 18
Delia Martinoya	106 25
R. S. Halley	266 25
R. P. Risley	103 60
C. L. Arnold	3 00
C. A. Black	107 10
Geo. Besser	14 23
L. W. Cursey	388 60
Sam. Croft	150 81
Sam. Hornbrook (to be paid George Edwards, $38.90)	
Sam. Hornbrook (to be paid J. F. Holst, $61.10)	140 84
Wm. Looney	63 08
Dudley Lockwood	162 81
John Looney	16 43
R. D. Reid	19 98
Wilson Winn	40 26
Charles Woeller	239 88
G. C. Matthews, to be paid Holmes Cummins, assignee	400 00
O. P. Bard	258 32

For all of whom Frazer & Heath and Dehaven & Myrick are attorneys.

	Fred. J. Brebban	229 60
59	H. W. Beck, to be paid to Mattie Beck, widow	583 16
	W. L. Trask	352 26
A. Maury		428 77
John D. Huhn		44 64
Jacob Fink		56 00
J. Harvey Matthews		43 60
W. P. Tackett		40 00
S. L. Barinds		139 45
Pitkin Wright		124 80
D. Bergman		105 00

It is therefore ordered and decreed that the claims of the said various employees on said newspaper be fixed at the above amounts, respectively, and that the same are decreed to be liens on the funds and property as hereinbefore provided, and will be paid out of said funds and property to said solicitors or said parties, respectively.

A lien is decreed in favor of the parties represented by Frazer & Heath and Dehaven & Myrick for services in these litigations, after the satisfaction of which, if desired parties entitled to the sums aforesaid, or their assigns, may collect the sums respectively in person.

The costs in the case of A. D. Gwynne *et al. vs.* Memphis Appeal Co. *et al.* and J. B. Myrick *et al. vs.* Memphis Appeal Co. *et al.* and such costs in the case of Fink *vs.* Appeal Co. *et al.*, as hereinafter adjudged, will be first paid out of the fund in court before any distribution is made, as above ordered.

As to these two causes, this decree finally determines and disposes of same.

In the causes of Jacob Fink *vs.* Memphis Appeal Co. *et al.* and Cris. Hettinger *vs.* Memphis Appeal Co. *et al.*, which has heretofore been consolidated with, have been heard with the two above causes and the said bills, amended and supplemental bills and cross-bills filed therein, so far as they seek any interest in the fund in
60 court, or to fasten any claim upon the assets and properties covered by the deed of trust made to A. D. Gwynne *et al.* by the Memphis Appeal Co. are dismissed, it appearing to the court that the fund in court will be insufficient to pay the claims already adjudged, as prior encumbrances thereon; and, for the reason hereinbefore stated, said bills, supplemental bills and cross-bills are dismissed, so far as they seek to fasten any claims upon the Appeal building and lot.

In these causes a reference is ordered to the clerk and master to take proof and report what persons filing petitions in these causes are creditors of the Memphis Appeal Co., and the amount and character of their claims. But it further appearing that there are no assets and properties of the Memphis Appeal Co., out of which the claim- of the general creditors can be paid, which have been impounded in these causes, this reference will not be executed except at the request of said general creditors.

Under his cross-bill it is decreed that W. J. Chase recover of the Memphis Appeal Company $5,662.34, but as he is decreed a preferred creditor to the amount of $4,652.50 by this decree, he is now decreed a general creditor for the balance or $1,099.84, so that his whole claim as preferred and general creditor is decreed to be $5,662.34.

The costs in the case of Jacob Fink *et al. vs.* Memphis Appeal Co. *et al.* accruing prior to the sale of the assets in the hands of the receiver, except such costs as were incurred in the filing of petitions in said cause, are ordered to be paid out of the fund in court, including a reasonable fee to the solicitor filing the general creditors' bill for his service up to that time, and a reference is ordered to determine what should be the amount of said fee.

The costs which have accrued in said cause in the filing of petitions and cross-bills therein, and which have accrued since
61 the sale of the assets in these causes, are taxed against the complainant and the several parties filing petitions and cross-bills, respectively, each party being taxed with the costs of their respective petitions, original bills, and *pro rata* in all the other costs in said cause.

The costs in the cause of Chris. Hettenger *vs.* Memphis Appeal Co. *et al.*, are taxed against the complainant in said cause. The petition of Adams & Trimble for attorneys' fees as solicitors of the Memphis Appeal Co. is disallowed and dismissed.

From so much of this decree as adjudges that the execution in favor of said judgment creditors in the case of Foley-Williams Mfg. Co. *vs.* Memphis Appeal Co. *et al.* were no liens on the assets from which the fund in court was derived, and from so much of the de-

cree as adjudged that Lawrence Lamb is not entitled to a lien on the fund in court for the payment of the amount paid by him as aforesaid, and that the costs in the case of Foley-Williams Mfg. Co. *et al.* are not a lien upon the fund in court, the said Lawrence Lamb prays an appeal, which is in the exercise of discretion vested in the court by statute, granted on his executing a bond, with security for costs, in the sum of $1,000; and that said S. C. Beckwith prays an appeal from so much of the decree as adjudges that he has no lien upon the fund in court, for the payment of his judgment against the Memphis Appeal Co., and dismisses his cross-bill, which is in the discretion aforesaid by the court granted, upon his executing a bond for costs in the sum of $1,000.

All of which is ordered, adjudged and decreed.

For all costs awarded above, other than that directed to be paid out of the fund, executions will issue against the respective parties and their sureties.

WILLIAM D. BEARD, *Chancellor.*

62 EXHIBIT 8.

At a term of the chancery court of Shelby county, Tennessee, held at the court-house, in the city of Memphis, on the 8th day of July, 1896.

Present: Hon. William D. Beard, chancellor.

JACOB FINK ET AL. vs. MEMPHIS APPEAL CO. ET AL. } 8888 R. D.

A. D. GWYNNE ET AL. vs. MEMPHIS APPEAL CO. ET AL. } 8852 R. D.

} *Procedendo* on Decree.

These consolidated causes coming on to be heard this day on the *procedendo* of the supreme court of Tennessee, which *procedendo* is in the words and figures as follows:

A. D. GWYNNE ET AL. & R. J. MORGAN, Trustees, vs. THE MEMPHIS APPEAL CO. ET AL. } No. 60.

and

JACOB FINK ET AL. vs. MEMPHIS APPEAL CO. ET AL. }

} Shelby Chancery Docket.

"These causes were heard upon the transcript from the
63 chancery court (part II) of Shelby county, and having been fully considered by the court it is adjudged as to matters raised by the assignment of error as follows:

First. That the attempted increase of the capital stock of the Memphis Appeal Company to $250,000 from $100,000 was illegal, being contrary to the provisions of its charter and that the issue of $200,000 of its bonds by the Memphis Appeal Company was *ultra vires* and same are void.

Second. The conveyance made by W. A. Collier and Alice T. Collier to the Memphis Appeal Company on June 7th, 1892, and by the Memphis Appeal Company to the Memphis Trust Company on June 7th, 1892, of the property described as being in Memphis, Shelby county, Tennessee, and situated at the northwest corner of Main and Jefferson streets, and fronting 74½ feet more or less on the west side of Main street, and running back between parallel lines with the north line of Jefferson street 105 feet more or less are adjudged to be null and void; because said Appeal Company had no power to buy any property of that character and extent and had no power to issue its purchase-money obligation therefor, the latter in connection with its then existing debts, being far in excess of the rightful capital stock of said company, and accordingly all obligations incurred by the Appeal Company in connection with the attempted purchase of this property are declared to be void.

The title to said above property is now hereby declared to be vested in J. B. Loring under his purchase of September 10th, 1894, from Collier and wife, subject to the outstanding lien of the trust deed made to John I. Dunn, as trustees to secure an indebtedness of $66,000 with interest thereon due the Lombard Investment Company or its assigns which lien is declared to be a first lien on said property.

64 It is now adjudged that an equitable mortgage was created in favor of Casey Young, John McCallum, L. B. McFarland and Holmes Cummins, which secured them in the amounts advanced by them to the Memphis Appeal Company, on or about August 1st, 1893; and the court adjudges that under said equitable mortgage, the following-named parties are entitled to be paid out of the fund in court in full, the following amounts with interest thereon from August 1st, 1893, viz:

Casey Young	$1,000
L. B. McFarland	1,250
Holmes Cummins	1,000

Third. That the trust deed made about September 20, 1893, to complainants Gwynne & Morgan, trustees, is void upon its face, and is so adjudged; however, the court is of opinion that said deed was executed in good faith by all parties thereto, and the beneficiaries therein mentioned, so far as they may establish valid claims against the Appeal Company, will share in the distribution of the fund in court as general creditors.

Fourth. It is adjudged that W. F. Taylor have and recover judgment of J. B. Loring for $6,500, the amount which he has paid as endorser for W. A. Collier on his note, and for which he held an interest in the said $200,000 of which bonds or a portion of the same; but said Taylor will not be allowed any interest on said claim, the court al-

lowing him only the face of his claim, or the amount actually paid out by him as such endorser.

This judgment in favor of Taylor, is made a charge and lien upon the Appeal building above described in this decree.

Fifth. W. A. Collier and Alice T. Collier are entitled to recover from the Appeal Company and to be paid out of the fund in court as general creditors, whatever rents or rental value may be
65 due them by the Appeal Company for its occupancy or possession of said Appeal building after June 7th, 1892, the court holding the deed of that date from Collier and wife to the Appeal Company to be void, and that said company is liable for all rents collected or realized by it whilst in possession under said deed.

The court further adjudges and decrees that the receiver is liable to the said Collier and wife for the reasonable rental value of the portion of said building occupied by him, the court finding and adjudging that said Collier and wife have failed to establish any contract liability on the part of the receiver.

The purchaser, W. J. Crawford, having assumed this liability of the receiver, said Collier and wife will be awarded judgment against him therefor, as and when established, but this right of judgment against him shall not affect this right, which right is here adjudged to be paid out of the fund in court, if necessary to this interest.

The said liability of the receiver for rent is subject to any proper and legal offsets or count-claims which said receiver or said Crawford may establish.

Sixth. The decree of the court below in respect to the notes held by the Security Bank of Memphis and Memphis City bank is affirmed except so far as W. A. Collier and his assignee, Joseph Haines are by the decree below denied the right to be subrogated to the rights of the Security bank in respect to the $5,000.00 deposited with said bank by W. A. Collier said Security bank will — *pro rata* in the general fund herein upon the basis of its full debt of $12,500.00 with interest and attorneys' fees without accounting for said $5,000.00 collected, until its full debt is paid.

In the event the *pro rata* so received does not pay its debt in full the said $5,000.00 is to be used in making up the deficiency, and
66 the balance of the said $5,000.00 not so necessarily used in making up of such deficiency aforesaid, is decreed to Joseph Haines, assignee of W. A. Collier for which the Security Bank of Memphis will account to said Haines.

Seventh. As to the question of the attorneys' fees, to the solicitor filing the general creditors' bill, it is adjudged that the bill was well filed, and that the amount that would be proper to be paid to the attorneys representing said bill will be determined upon the reference to be had in the court below, and a lien is hereby declared in favor of Walter Malone, said solicitor on the fund in the court, in this cause for such services.

Eighth. The court adjudges that the indebtedness incurred for the purchase of the properties of the Avalanche Company is the indebtedness of the Memphis Appeal Company, and it will be so treated upon the reference.

Ninth. The decree of the chancery court is affirmed except, as it is hereby reversed or modified, and the cause is remanded to the chancery court to be proceeded with in accordance with this decree and the opinion of the court herein pronounced.

The court makes no adjudication whatever as to any of the creditors against the Memphis Appeal Co., except as aforesaid, in respect to the holders of the obligations, or renewals thereof, executed under the purchase of the Avalanche properties and leaves all such to be established under the reference as herein authorized and directed.

The costs of the court below will be paid as ordered by the chancellor; and the costs of this court will be paid out of the fund in court."

And the decree of the supreme court is thereupon made the decree of this court, a reference is hereby ordered to the clerk and
67 master in obedience to said decree to ascertain and report with promptness what, from the proof to be taken by him, would be a reasonable fee for legal services performed by Walter Malone, counsel for general creditors in these causes.

The clerk and master will also upon the proof taken and to be taken, report to the next term of this court the various creditors of the Memphis Appeal Co., and the amount of all their respective claims.

The clerk and master will, however, take proof as to the fees of complainant's counsel, and report thereon as soon as proof thereon is completed, and upon all matters of reference contained in said decree of the supreme court, the clerk and master will report to the next term of the court.

WILLIAM D. BEARD, *Chancellor.*

It is agreed that the interest at six per cent. per annum on plaintiff's claim of $3,902.74, calculated to March 21, 1899, amounts to $1,064.58, making plaintiff's total claim $4,967.32.

Both parties rest.

Defendant asks for a dismissal of the complaint.

Motion denied; defendant excepts.

Mr. OTIS: I ask the court to direct a verdict in favor of the plaintiff for $4,967.32.

Motion granted; defendant excepts.

Mr. PORTER: I ask that the court direct a verdict in favor of the defendant.

Motion denied; defendant excepts.

68 Thereupon the jury, under the direction of the court, rendered a verdict in favor of the plaintiff for $4,967.32, to which defendant duly excepted.

On motion of plaintiff's counsel an extra allowance of 5 % is granted to the plaintiff. On motion of defendant's counsel a stay of execution is granted for thirty days after notice of entry of judgment and sixty days granted defendant, in which to make and serve a case on appeal.

The foregoing case contains all the evidence taken on the trial of this action.

Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
against
SAMUEL C. BECKWITH, Defendant.

CITY OF NEW YORK, }
County of New York, } *ss:*

Thomas Kilvert, being duly sworn, says: I am a member of the firm of Porter & Kilvert, the attorneys for the defendant herein. No opinion was delivered by Mr. Justice Bischoff upon the trial of this action in the court below.

THOS. KILVERT.

Sworn to before me this 7th day of April, 1899.

JOHN B. PANNES,
Notary Public, N. Y. County.

69 Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant. } Notice of Appeal.

Please take notice that the defendant appeals to the appellate division of the supreme court of the State of New York for the first department from the judgment entered in this action on the 24th day of March, 1899, in the office of the clerk of the county of New York, in favor of plaintiff and against the defendant for the sum of $5,665.14 and from each and every part thereof.

Dated New York, April 6, 1899.

PORTER & KILVERT,
Attorneys for Defendant, Appellant.

Office and post-office address, 154 Nassau street, New York.

To William Sohmer, Esq., clerk of the county of New York; Otis & Pressinger, Esqs., attorneys for plaintiff-respondent.

70 It is hereby consented that the within case and exceptions upon appeal be settled and ordered on file as printed.

N. Y., April 14th, 1899.

PORTER & KILVERT,
Appellant's Attorneys.
OTIS & PRESSINGER,
Respondent's Attorneys.

Within case is hereby settled as printed and ordered on file.

Dated New York, April 14, 1899.

HENRY BISCHOFF, JR., *J. S. C.*

It is stipulated that the foregoing are true copies of the original case and other papers required to be printed by rule 41, and certification thereof pursuant to the provisions of section 1353 of the Code of Civil Procedure or otherwise is hereby waived.

Dated New York, April 14, 1899.

OTIS & PRESSINGER,
Attorneys for Plaintiff.
PORTER & KILVERT,
Attorneys for Defendant.

71 It is stipulated that the foregoing are true copies of the original case, judgment notice of appeal and other papers required to be printed by rule 41, and certification thereof pursuant to the provisions of section 1353 of the Code of Civil Procedure or otherwise is hereby waived.

Dated New York, April 17, 1899.

OTIS & PRESSINGER,
Attorneys for Plaintiff, Respondent.
PORTER & KILVERT,
Attorneys for Defendant, Appellant.

72 *Order of Affirmance.*

At a term of the appellate division of the supreme court of the State of New York for the first department, held at the court-house thereof in the county of New York on the 23d day of June, 1899.

Present: Hon. Charles H. Van Brunt, P. J.
Hon. William Rumsey, J.
Hon. Morgan J. O'Brien, J.
Hon. George L. Ingraham, J.
Hon. Chester B. McLaughlin, J.

COMMERCIAL PUBLISHING COMPANY, Plaintiff and Respondent,
against
SAMUEL C. BECKWITH, Defendant and Appellant.

The appeal by the defendant from the judgment for $5,665.14 entered herein on the 24th day of March, 1899, in favor of the plaintiff and against the defendant, having been called for argument in its regular order on the calendar of this court, and after hearing Anthony B. Porter, Esq., of counsel for appellant, in support of said appeal, and A. Walker Otis, of counsel for respondent, in opposition thereto, it is on motion of Otis & Pressinger, the attorneys for the plaintiff,

Ordered that said judgment be and the same is hereby affirmed with costs and disbursements.

Enter.

C. H. V. B.

73 *Judgment, July* 10, 1899.

Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff,
vs.
SAMUEL C. BECKWITH, Defendant.

A judgment for $5,665.14 having been entered herein on the 24th day of March, 1899, in favor of the plaintiff and against the defendant, and the defendant having appealed therefrom to the appellate division of this court for the first department, and said appellate division by an order bearing date June 23, 1899, and filed in the office of the clerk of said appellate division on July 3, 1899, having affirmed said judgment with costs and disbursements, and the remittitur from said appellate division having been filed in the office of the clerk of the county of New York on the 5th day of July, 1899, and the costs of the plaintiff having been duly taxed on notice at the sum of one hundred and three and $\frac{90}{100}$ dollars, it is, on motion of Otis & Pressinger, the attorneys for the plaintiff.

Adjudged that said judgment of March 24, 1899, be and the same is hereby affirmed and that the plaintiff recover of the defendant the sum of one hundred and three and $\frac{90}{100}$ dollars its costs as aforesaid, and that the plaintiff have execution therefor.

[L. S.] WM. SOHMER, *Clerk.*

74 Supreme Court, Appellate Division, First Department.

COMMERCIAL PUBLISHING COMPANY, Plaintiff and Respondent,
against
SAMUEL C. BECKWITH, Defendant and Appellant.

CITY OF NEW YORK,
County of New York, } ss:

Thomas Kilvert, being duly sworn, says I am a member of the firm of Porter & Kilvert, the attorneys for the defendant appellant herein. No opinion was delivered by the judges of the appellate division upon the argument of the appeal before that court.

THOS. KILVERT.

Sworn to before me this 19th day of July, 1899.

EUGENE NEWMAN,
Commissioner of Deeds, City of New York,
Residing in New York County.

75 Court of Appeals, State of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff and Respondent,
against
SAMUEL C. BECKWITH, Defendant and Appellant.

Please take notice that the appellant Samuel C. Beckwith appeals to the court of appeals of the State of New York from the judgment in this action entered July 10th, 1899, in the office of the clerk of the county of New York upon the order of the appellate division of the supreme court for the first department dated June 23d, 1899, for the sum of one hundred and three and $\frac{99}{100}$ dollars costs of appeal and also affirming the judgment for $5,655.14, entered in this action March 24, 1899, in favor of the plaintiff against the defendant and that the appellant intends to bring up for review upon such appeal the said order; and the defendant appellant hereby stipulates and agrees if such judgment be affirmed, judgment absolute shall be rendered against him in favor of the plaintiff respondent.

Dated New York, July 18th, 1899.

Yours &c.,
PORTER & KILVERT,
Defendant's and Appellant's Attorneys,
Tribune Building, New York.

Messrs. Otis & Pressinger, attorneys for plaintiff and respondent, 111 Broadway, New York city and William Sohmer, Esq., clerk of the county of New York.

76 Pursuant to section 3301 of the Code of Civil Procedure it is hereby stipulated by and between the attorneys for the respective parties to this appeal that the foregoing is a true and correct copy of the judgment-roll, and of the case and exceptions, and the judgment given thereon, and of the notice of appeal and of all other papers required to be transmitted to the court of appeals by the clerk of the county of New York upon whom the notice of appeal herein to said court of appeals was served, and certification of such papers by the said clerk is hereby waived.

Dated N. Y., July 19, 1899.

OTIS & PRESSINGER,
Plaintiff and Respondent's Attorneys.
PORTER & KILVERT,
Defendant and Appellant's Attorneys.

77 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 4th day of June, in the year of our Lord one thousand nine hundred and one, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, June 5, 1901.

COMMERCIAL PUBLISHING COMPANY, Respondent,
ag'st
SAMUEL C. BECKWITH, Appellant.

Be it remembered that on the 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-nine, Samuel C. Beckwith the appellant in this action came here into the court of appeals by Porter & Kilvert, his attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the first judicial department, and Commercial Publishing Company, the respondent in said action, afterwards appeared in said court of appeals by Otis & Pressinger its attorneys, which said notice of appeal and return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. A. B. Porter of counsel for the appellant and by Mr. A. Walker Otis of counsel for the respondent, and after due deliberation had thereon did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be and the same hereby is reversed and the complaint dismissed with costs.

78 And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be and the same hereby is reversed, &c., &c., as aforesaid, and hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

R. M. BARBER,
Dep. Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 5th*, 1901.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER,
Dep. Clerk.

Endorsed: "Filed June 10, 1901."

79 At a special term part one of the supreme court New York county held at the court-house in the city of New York on the 20th day of June, 1901.

Present: Hon. Henry Bischoff, Jr., justice.

COMMERCIAL PUBLISHING COMPANY
against
SAMUEL C. BECKWITH.

The defendant having duly appealed to the court of appeals of the State of New York from the judgment in this action entered July 10th, 1899 in the office of the clerk of the county of New York upon the order of the appellate division of the supreme court for the first department dated June 23rd, 1899 for the sum of $103.90 costs of appeal and also affirming the judgment for $5,655.14 entered in this action March 24th, 1899 in favor of the plaintiff against the defendant and said appeal having been duly heard and determined, in favor of defendant, and the remittitur thereon having been filed in the office of the clerk of the county of New York on the 10th day of June, 1901.

Now on reading the said remittitur from the said court of appeals and proof of service on plaintiff's attorneys of notice of such filing and of application for this order and on motion of Porter & Kilvert attorneys for the defendant appellant and no one opposing on the part of the plaintiff it is

Ordered that the said judgment of the court of appeals be duly made the judgment of this court and that the defendant's costs be duly taxed by the clerk of this court and duly inserted in the judgment to be entered under and pursuant to this order.

Enter,

H. B., JR., *J. S. C.*

Endorsed: "Filed June 20, 1901."

80 Supreme Court, New York County.

COMMERCIAL PUBLISHING COMPANY
against
SAMUEL C. BECKWITH.

The defendant having duly appealed to the court of appeals of the State of New York from the judgment in this action entered July 10th, 1899 in the office of the clerk of the county of New York upon the order of the appellate division of the supreme court for the first department dated June 23rd, 1899 for the sum of $103.90 costs of appeal and also affirming the judgment for $5,655.14 entered in this action March 24th 1899 in favor of the plaintiff against the defendant and said appeal having been duly heard and determined in favor of defendant rendering final judgment in his favor reversing said judgment so appealed from and dismissing the complaint with costs and the remittitur thereon having been filed in the office of the clerk of the county of New York on the 10th day of June, 1901, and an order having been made the 20th day of June, 1901

directing the making the judgment of the court of appeals the judgment of this court,

It is adjudged, that the judgment of the court of appeals be and the same is hereby made the judgment of this court and that Samuel C. Beckwith the defendant recover of The Commercial Publishing Company plaintiff $849.60 costs and disbursements duly taxed by the clerk of this court on June 21st, 1901, and that he have execution therefor.

Dated N. Y., June 21st, 1901.

[SEAL.]

WM. SOHMER, *Clerk.*
M. J. D.

Endorsed: " Filed June 21, 1901."

647.

STATE OF NEW YORK, *County of New York*, } ss:

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original record, Commercial Publishing Company *vs.* Samuel C. Beckwith, on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 3rd day of July, 1901.

[Seal of New York.]

WM. SOHMER, *Clerk.*

81 Supreme Court, County of New York.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error, *vs.* SAMUEL C. BECKWITH, Defendant in Error. } Petition for Writ of Error.

To the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of Commercial Publishing Company the plaintiff in error herein respectfully shows:

I.

That The Commercial Publishing Company, the plaintiff in error herein is a foreign corporation duly organized and existing under the laws of the State of Tennessee and engaged in the publication at Memphis, in said State, of a newspaper known as the Commercial Appeal.

That the defendant in error is a resident of the city, county and State of New York.

II.

That prior to the 30th day of September, 1893, the Memphis Appeal Company, a corporation organized under the laws of the State of Tennessee was engaged in the publication at said city of Memphis, of a newspaper known as the Memphis Appeal-Avalanche.

That on or about September 30, 1893, one Andrew D. Gwynne and others began an action in the chancery court of Shelby
82 county, Tennessee against said Memphis Appeal Company and others, to which action the defendant in error herein was a party. That on the 30th day of September, 1893, a decree was entered in said action appointing one William J. Chase receiver of certain property and assets of said Memphis Appeal Company.

III.

That said receiver qualified under said decree of September 30, 1893 on the same day, and at once took possession of the property mentioned in said decree and continued the publication of said Memphis Appeal-Avalanche from the 30th day of September, 1893 to the 16th day of June, 1894, and was still acting as such receiver on March 26, 1896.

IV.

That between September 30, 1893 and June 16, 1894 said receiver published in said newspaper certain advertisements for account of various parties, the value of which advertisements amounted to the sum of $3,902.74.

That on or about the 5th day of October 1893, a petition for removal to the circuit court of the United States for the western division of the western district of Tennessee was filed in said action of Andrew D. Gwynne *et al. vs.* The Memphis Appeal Company *et al.* by said Samuel C. Beckwith, the defendant in error herein, on the ground that a separable controversy existed between the complainants therein and said Samuel C. Beckwith, and thereupon said chancery court of Shelby county, Tennessee and said circuit court of the United States for the western division of the western district of Tennessee acquired and exercised concurrent jurisdiction of said cause.

83 V.

That between the 5th day of October 1893, and the 6th day of April 1894, a controversy arose between Samuel C. Beckwith, the defendant in error herein, and said William J. Chase, as such receiver, touching the ownership of the moneys due to said receiver for the publication of said advertisements by said receiver as aforesaid, said Samuel C. Beckwith claiming the right to collect said moneys because of a contract made between said Samuel C. Beckwith and the Memphis Appeal Company on January 3, 1891, while said receiver claimed the right to collect said moneys because of the fact that they accrued for advertisements published by him as such receiver under the order of the court by which he was appointed.

VI.

That thereafter and during the month of April 1894 decrees were simultaneously entered in said action thus pending in the chancery court of Shelby county, Tennessee, and in said action then pending in the circuit court of the United States for the western division of the western district of Tennessee, appointing E. B. McHenry, who was the clerk and master of said chancery court and J. B. Clough, who was the clerk of said circuit court of the United States, special commissioners to sell at public auction said The Memphis Appeal-Avalanche newspaper with all the rights, privileges, benefits, franchises, &c., belonging to or in any way pertaining to the same, together with its good will, subscription list, advertising patronage, income and profits, and all the machinery, appliances, furniture, material, property, assets, &c. of every kind and description,
84 and the general outfit of the newspaper then in the hands of the receiver in said causes.

That in order to sell the accounts due said receiver for said advertisements so published by him during his administration as aforesaid, and to make same bring their value, said decrees of sale contained the following provision relative to the sale of said accounts:

"All accounts which may be or to become due to the receiver by reason of the operation of the newspaper in his hands, will pass to and be acquired by the purchaser at this sale who will become the full owner of the same. * * * The purchaser at the sale herein ordered will acquire the absolute title to all the property decreed to be sold, free from all claims, liens, and encumbrances whatever, save as provided above as to the contract obligations of the receiver; and the proceeds of sale will stand in these causes in lieu and place of the property itself."

VII.

That on the 16th day of June 1894, said commissioners acting under the decrees aforesaid, sold at public auction in the city of Memphis the property aforesaid, when and where same was struck off to one West J. Crawford, he paying therefor to said E. B. McHenry and J. B. Clough as such commissioners, the sum of $65,200.00, and he being the highest, best and last bidder therefor.

VIII.

That on the 3rd day of July, 1894, a decree was entered in said action of Andrew D. Gwynne *et al.* against The Memphis Appeal Company *et al.* thus pending in the chancery court of Shelby county, Tennessee, confirming said sale of June 16, 1894. That on the 3rd day of July, 1894, a decree was also entered in said action of Andrew D. Gwynne *et al. vs.* The Memphis Appeal Company *et al.*
85 thus pending in the circuit court of the United States for the western division of the western district of Tennessee confirming said sale of June 16, 1894.

IX.

That at the time of the making of said various decrees as aforesaid said chancery court of Shelby county, Tennessee and said circuit court of the United States for the western division of the western district of Tennessee had jurisdiction of the subject-matter of said actions and of the parties thereto, including said William J. Chase as such receiver, and said Samuel C. Beckwith the defendant in error herein.

X.

That prior to the 28th day of February, 1896, the defendant in error collected from the various parties for whom said advertisements were published by said receiver as aforesaid, the sum of $3,902.74, being the value and price of said advertisements as above stated, said various sums having been paid by said various parties to the defendant in error in consideration of the publication by said receiver of said advertisements for their account in said Memphis Appeal-Avalanche between September 30, 1893 and June 16, 1894 while said receiver was publishing said newspaper as aforesaid.

XI.

That prior to the 28th day of February, 1896, said West J. Crawford duly assigned and transferred to the plaintiff in error all his claims, demands and rights of action against defendant in error which he, the said West J. Crawford acquired by virtue of
86 said sale of June 16, 1894 above referred to.

XII.

That prior to the 28th day of February, 1896, the plaintiff in error demanded from the defendant in error the moneys so collected, but said defendant in error has failed, omitted and refused to pay to the plaintiff in error said sums of money or any part thereof, he claiming to hold the same by virtue of said contract of January 3, 1891.

XIII.

That on the 28th day of February 1896, the plaintiff in error brought this action against the defendant in error in the supreme court of the State of New York for the county of New York to recover said sum of $3,902.74 with interest thereon from the 1st day of January 1894.

XIV.

That thereafter issue was joined in said action by the service by the defendant therein of an answer and supplemental answer.

That said action came on for trial at a trial term of the supreme court of the State of New York for the county of New York on the 21st day of March 1899 before the Hon. Henry Bischoff, Jr. and a jury, upon an agreed statement of facts, whereupon the plaintiff in error having proved among other things the facts above set forth, the court directed a verdict in favor of the plaintiff in error and

against the defendant in error for the sum of $4,967.32. That on the 24th day of March, 1899 a judgment in favor of plaintiff in error for $5,665.14 was duly entered on said verdict in the office of the clerk of the county of New York.

87 That thereafter the defendant in error prosecuted an appeal from said judgment of March 24, 1899 to the appellate division of said supreme court for the first judicial department thereof, and on the 23rd day of June, 1899 an order was duly made in said appellate division affirming said judgment of March 24, 1899 with costs. That on the 10th day of July, 1899 a judgment in favor of plaintiff in error was duly entered in the office of the clerk of the county of New York on said order of the appellate division affirming said judgment of March 24, 1899, with $103.90 costs to the plaintiff in error.

That thereafter the defendant in error appealed from said judgment of July 10, 1899 to the court of appeals of the State of New York, which is the highest court of the State of New York in which a decision in said suit could be had. That in said action your petitioner claimed that defendant in error was bound by the records and judicial proceedings in the chancery court of Shelby county, Tennessee, and the circuit court of the United States for the western division of the western district of Tennessee, thus introduced in evidence by your petitioner for the reason that defendant in error was a party to said proceedings, and that therefore defendant in error could not question the title acquired by said West J. Crawford at said sale of June 16, 1894 as aforesaid.

That thereafter and on the 4th day of June, 1901, a decision was rendered by said court of appeals reversing said judgment of July 10, 1899 and dismissing the complaint in said action with costs. That the judgment of said court of appeals was against each and all of the rights so claimed by your petitioner in said action as aforesaid in that said court of appeals held that said West J. Crawford did not acquire at said sale of June 16, 1894, any title to the accounts sold at said sale and sued for in this action, and by said decision said court of appeals refused to give to said records and judicial proceedings of said chancery court of Shelby county, Tennessee, and said circuit court of the United States for the western division of the western district of Tennessee, such faith and credit as they have by law or usage in the courts of the State from which they were taken, and thereby your petitioner was denied the rights conferred upon it in that regard by the Constitution and laws of the United States.

88

That thereafter and on the 10th day of June 1901, the remittitur from said court of appeals was duly filed in the office of the clerk of the county of New York.

That thereafter and on the 20th day of June 1901, an order was entered in said action in the supreme court of the State of New York for the county of New York, making the judgment of said court of appeals the judgment of said supreme court.

That thereafter and on the 21st day of June, 1901, a judgment in favor of defendant in error was duly entered in said action in the

supreme court for the county of New York, making the judgment of said court of appeals the judgment of said supreme court for the county of New York and dismissing the complaint, and awarding to the defendant in error the sum of $849.60 costs and disbursements, and directing that the defendant in error have execution therefor.

89 Wherefore forasmuch as your petitioner believes there was manifest error in said judgment of said court of appeals and in said judgment of the supreme court of the State of New York, entered on the remittitur from said court of appeals, which said judgments were against the several claims of your petitioner as hereinbefore set forth and in the final judgment in said action, which is to the great damage of your petitioner, your petitioner prays that your honor upon an examination of said record will grant to your petitioner a writ of error to the end that said judgment and record may be brought before the Supreme Court of the United States for review pursuant to the laws of the United States and the practice of the Supreme Court of the United States.

Dated New York, July 3, 1901.

OTIS & PRESSINGER,
Attorneys for Petitioner, 111 *Broadway*,
Borough of Manhattan, New York City.

90 [Endorsed:] New York supreme court county of New York. Commercial Publishing Company plaintiff against Samuel C. Beckwith defendant. Original. Petition for writ of error. Otis & Pressinger, attorneys for petitioner, 111 Broadway, borough of Manhattan, New York city. Filed July 11, 1901. Service of a copy of within petition is hereby admitted. Dated, N. Y., July 11th 1901. Porter & Kilvert att'ys for def't in error.

91 Supreme Court of the United States.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error,
vs.
SAMUEL C. BECKWITH, Defendant in Error.
} Assignment of Errors.

Now comes the above-named plaintiff in error by Otis & Pressinger its attorneys and says that in the record of proceedings in the above-entitled action there is manifest error in this, to wit:

I.

The supreme court of the State of New York, under the direction of the court of appeals of said State, erred in deciding that the decree of sale made by the circuit court of the United States for the western division of the western district of Tennessee on the 6th day of April, 1894, and the decree amending said last-mentioned decree made in said circuit court of the United States for the western division of the western district of Tennessee on the 30th day of April, 1894, and the decree made in said circuit court of the United States for the

western division of the western district of Tennessee on the 3rd day of July, 1894, confirming the sale made under said decrees of April 6, 1894 and April 30, 1894, were not binding on the defendant in error herein, he being a party to the action in which said decrees were rendered, and in deciding that West J. Crawford, the purchaser at said sale did not acquire by virtue thereof as against the defendant in error, a good and valid title to the claims for advertising sold at said sale and sued for herein, amounting to
92 $3,902.74, and thereby there was drawn in question in said court of appeals and in said supreme court of the State of New York, a title claimed by plaintiff in error under an authority exercised under the United States, and the decision was against the title specially set up or claimed by the plaintiff in error under said authority.

II.

The supreme court of the State of New York under the direction of the court of appeals of said State, erred in deciding that the decree of sale made by the chancery court of Shelby county, Tennessee, on the 6th day of April, 1894, and the decree amending said last-mentioned decree made in said chancery court of Shelby county, Tennessee on the 30th day of April, 1894, and the decree made in said chancery court of Shelby county, Tennessee on the 3rd day of July, 1894, confirming the sale made under said decrees of April 6, 1894 and April 30, 1894, were not binding on the defendant in error herein, he being a party to the action in which said decrees were rendered, and in deciding that West J. Crawford, the purchaser at such sale did not acquire by virtue thereof as against the defendant in error, a good and valid title to the claims for advertising sold at said sale and sued for herein, amounting to $3,902.74, and thereby there was drawn in question in said court of appeals and in said supreme court of the State of New York a title, right, privilege or immunity claimed by the plaintiff in error under the Constitution and laws of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error, in that the court of appeals and the supreme court of the State of New York in deciding as aforesaid, refused to
93 give to the records and proceedings of the chancery court of Shelby county, Tennessee and of the circuit court of the United States for the western division of the western district of Tennessee such faith and credit as they have by law or usage in the courts of the State from which they were taken, and thereby plaintiff in error was denied the rights conferred upon it in that regard by the Constitution and laws of the United States.

III.

The supreme court of the State of New York under the direction of the court of appeals of said State, erred in deciding that said West J. Crawford did not as against defendant in error acquire at said sale of June 16, 1894 any title to the accounts sued for herein for that defendant in error and William J. Chase the receiver appointed

in said proceedings in the courts of Tennessee were both parties to the actions above referred to, and the court having jurisdiction of these two parties who were rival claimants to the accounts in question, the court in order to make said accounts bring their full value, made a decree of sale providing that said accounts should be sold free and clear of the claims of the rival claimants and that the proceeds should stand in lieu and place of the property so sold. That said sale was had accordingly, when said accounts were purchased by West J. Crawford the assignor of plaintiff in error, and said sale was duly confirmed by the court, therefore said court of appeals should have held that defendant in error was bound by said proceedings and said sale and that there having been conferred upon him in said proceedings the right to contend for the purchase-money, he could not attack the title of the purchaser, and

94 said court of appeals and said supreme court of the State of New York in obedience to the remittitur of the court of appeals having held that said West J. Crawford did not acquire title to said accounts at said sale as against the defendant in error, said court of appeals and said supreme court of the State of New York thereby refused to give to said records and judicial proceedings of the chancery court of Shelby county, Tennessee and of the circuit court of the United States for the western division of the western district of Tennessee, such faith and credit as they have by law or usage in the courts of the State from which they were taken, and thereby there was drawn in question in said court of appeals and in said supreme court of the State of New York, a title, right, privilege or immunity claimed by the plaintiff in error under the Constitution and laws of the United States and the decision was against the title, right, privilege or immunity specially set up or claimed by plaintiff in error and thereby plaintiff in error was denied the rights conferred upon it in that regard by the Constitution and laws of the United States.

Wherefore plaintiff in error prays that the judgment entered as aforesaid on the 21st day of June, 1901 may be reversed, and the judgments entered as aforesaid on the 24th day of March, 1899 and the 10th day of July, 1899 may be affirmed and that plaintiff in error may recover of defendant in error the costs of this court and of the court of appeals of the State of New York.

Dated New York, July 3, 1901.

OTIS & PRESSINGER,
Attorneys for Plaintiff in Error, 111 Broadway,
Borough of Manhattan, New York City.

95 [Endorsed:] E. & A. Supreme Court of the United States. Commercial Publishing Company plaintiff against Samuel C. Beckwith defendant Original. Assignment of errors. Otis & Pressinger, attorneys for plaintiff in error 111 Broadway, borough of Manhattan, New York city. Filed July 11 1901 Service of a copy of within assignment of errors is hereby admitted. Dated, N. Y., July 11th 1901 Porter & Kilvert att'ys for def't in error

96 Supreme Court of the State of New York, County of New York.

COMMERCIAL PUBLISHING COMPANY, Pl'ff in Error, *vs.* SAMUEL C. BECKWITH, Def't in Error. } Bond for Damages and Costs.

Know all men by these presents, that we, A. Frank Richardson of No. 109 West 74th street in the city county and State of New York and Henry Webb of Hotel Bartholdi corner Broadway and 23rd street in said city county and State are held and firmly bound unto the above-named Samuel C. Beckwith in the sum of sixteen hundred & ninety-nine & $\frac{20}{100}$ dollars, to be paid to the said Samuel C. Beckwith for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3rd day of July in the year of our Lord one thousand nine hundred and one.

Whereas, the above-named Commercial Publishing Company has prosecuted a writ of error to the supreme court of the State of New York for the county of New York returnable in the Supreme Court of the United States on the fifth day of August 1901 to reverse the judgment rendered in the above-entitled suit, on the 21st day of June 1901 which reversed a judgment for 5,655.14 entered in favor of plaintiff in error on March 24 1899 and also a judgment for 103.90 entered in favor of plaintiff in error on June 23 1899 and awarding 849.60 costs to defendant in error.

Now therefore, the condition of this obligation is such, that if the above-named Commercial Publishing Company shall prosecute said writ of error to effect and answer all damages and costs, if it shall fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

A. FRANK RICHARDSON. [L. S.]
HENRY WEBB. [L. S.]

Sealed and delivered, and taken and acknowledged, this 3rd day of July 1901 before me,

F. H. DENMAN,
[L. S.] *Notary Public, Westchester County.*

Certificate filed in New York county.

97 STATE OF NEW YORK, } ss:
County of New York, }

A. Frank Richardson and Henry Webb being duly sworn, do depose and say and each for himself says that they are worth the sum of thirty-three hundred and ninety-eight & $\frac{40}{100}$ dollars, over and above all their just debts and liabilities.

A. FRANK RICHARDSON.
HENRY WEBB.

Sworn to this 3rd day of July A. D. 1901, before me.

F. H. DENMAN,

[L. S.] *Notary Public, Westchester County.*

Certificate filed in New York county.

[Endorsed:] Supreme court county of New York Commercial Publishing Company pl'ff in error *vs.* Samuel C. Beckwith def't in error Copy. Bond for damages and costs on writ of error Otis & Pressinger, att'ys for pl'ff in error 111 Broadway borough of Manhattan, New York city Filed July 11, 1901 I approve the within bond as to form and sufficiency of sureties Dated July 6th 1901. R. W. Peckham. M. J. D.

98 By the Honorable Rufus W. Peckham, one of the justices of the Supreme Court of the United States, to Samuel C. Beckwith, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States to be holden at Washington on the fifth day of August 1901, pursuant to a writ of error filed in the clerk's office of the supreme court for the county of New York, wherein Commercial Publishing Company is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the State of New York, in the circuit above named, this 6th day of July, in the year of our Lord one thousand nine hundred and one, and of the Independence of these United States the one hundred and twenty-sixth.

R. W. PECKHAM,

Jus. Sup. Ct. U. S.

99 [Endorsed:] Supreme Court of the United States. Commercial Publishing Company pl'ff in error *vs.* Samuel C. Beckwith def't in error Citation. Otis & Pressinger att'ys for pl'ff in error, 111 Broadway borough of Manhattan New York city Received July 11, 1901 Wm. Sohmer, cl'k Service of a copy of within citation is hereby admitted—Dated New York July 11, 1901 Porter & Kilvert att'ys for def't in error.

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York for the first judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being a judgment entered pursuant to a remittitur from the court of appeals of the State of New York same being the highest court of the said State in which a decision could be had in the said suit between Commercial Publishing Company

plaintiff and Samuel C. Beckwith defendant wherein is drawn in question a title claimed under an authority exercised under the United States and the decision is against said title, or where a title right privilege or immunity is claimed under the Constitution and laws of the United States and the decision is against the title right, privilege or immunity specially set up or claimed by either party under the Constitution and laws of the United States and wherein a manifest error hath happened to the great damage of the said Commercial Publishing Company as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fifth day of August, 1901, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 6th day of July, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-sixth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
R. W. PECKHAM,
Jus. Sup. Ct. U. S.

[Endorsed:] Supreme Court of the United States. Commercial Publishing Company plaintiff in error, *vs.* Samuel C. Beckwith defendant in error. Writ of error. Otis & Pressinger attorneys for plaintiff in error, 111 Broadway borough of Manhattan New York city Received July 11, 1901 Wm. Sohmer clerk. Service of a copy of within writ of error is hereby admitted. Dated New York July 11, 1901 Porter & Kilvert att'ys for def't in error.

101 STATE OF NEW YORK, } *ss:*
County of New York, }

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify, that by virtue of the annexed writ of error and in obedience thereto I have compared the preceding with the original papers hereto annexed on file in my

office, and that the same are correct transcripts therefrom, of the record and proceedings had in said court and the whole of such originals in the cause of Commercial Publishing Company *vs.* Samuel C. Beckwith.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 12th day of July 1901.

[Seal of New York.]

WM. SOHMER, *Clerk.*

Endorsed on cover: File No. 18,222. New York supreme court. Term No. 369. Commercial Publishing Company, plaintiff in error, *vs.* Samuel C. Beckwith. Filed July 13th, 1901.

Supreme Court of the United States.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

vs.

SAMUEL C. BECKWITH,
Defendant in Error.

No. 369.
October Term,
1901.

Brief for Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

FACTS.

In September, 1893, there was in existence at Memphis Tennessee, a corporation organized under the laws of Tennessee called the Memphis Appeal Company, which was engaged in the publication at the City of Memphis of a newspaper known as the Memphis *Appeal-Avalanche*.

Record, p. 11, fol. 19.

In September, 1893, a suit in equity was brought in the Chancery Court of Shelby County, Tennessee, by one Gwynne and others against said Memphis Appeal Company and others. Samuel C. Beckwith, the defendant in error herein, was a party defendant to that suit.

Record, p. 13, fol. 22.

On September 30, 1893, a decree was entered in the Gwynne suit appointing one Chase receiver of the property of said Memphis Appeal Company and directing him to continue the publication of said newspaper under the direction of the Court. Said receiver qualified and published the newspaper as such receiver from September 30, 1893, to June 16, 1894

Record, p. 13, fol. 22.

Between September 30, 1893, and June 16, 1894, said receiver published in said newspaper advertisements for account of the various parties mentioned in Exhibit B, amounting in value to $3,902.74.

Record, p. 13, fol. 23.

On October 5, 1893, a petition for removal to the Circuit Court of the United States for the western division of the Western District of Tennessee was filed by Beckwith in the Gwynne suit on the ground that as to him a separable controversy existed and thereupon the State and Federal Court acquired and exercised concurrent jurisdiction of said cause.

Record, p. 14, fol. 24.

Early in November, 1893, one Fink brought a general creditor's bill against the Memphis Appeal Company for the purpose of winding it up as an insolvent corporation. Other suits were also brought against said Memphis Appeal Company. In January, 1894, all the pending suits, including that of Gwynne, were consolidated into one action.

Record, p. 14, fol. 24.
Record, p. 25, fol. 43.
Record, p. 26, fol. 45.

The consolidated action went to final decree on March 26,

1896, and from a portion of said decree said Beckwith prayed and was allowed an appeal.

Record, p. 15, fol. 26.
Record, p. 30, fol. 52.
Record, p. 36, fol. 61.

Said decree of March 26, 1896, was affirmed with some modifications by the Supreme Court of Tennessee, and thereupon under the procedendo from the Supreme Court a decree was entered on July 8, 1896, distributing the assets of the insolvent corporation among its creditors.

Record, p. 36, fol. 62.
Record, p. 15, fol. 26.

While the receiver was publishing the advertisements in question, a warfare of words was being carried on between Beckwith and the receiver relative thereto. Beckwith insisted that by virtue of a contract which he had made with the insolvent corporation more than two years before he had the right to collect the moneys due the Receiver for advertising and apply same on a claim which he held against the corporation. The Receiver on the other hand contended that he was in charge of the newspaper as Receiver, and that it was his duty to secure to the trust estate the revenues derived by him therefrom. Thereupon Beckwith notified the Receiver that he repudiated all rights claimed by said Receiver in the premises.

Record, p. 13, fol. 23.
Record, p. 23, fol. 39.
Record, p. 24, fol. 41.
Record, p. 25, fol. 42.

It appears by the record that the newspaper was not self-sustaining while published by the Receiver and that he was obliged to issue Receiver's certificates in order to carry it on.

Record, p. 27, fol. 47.
Record, p. 22, fol. 37.

As stated, the consolidated causes were not heard and disposed of until March, 1896. Some two years before the hearing and in April, 1894, the Court found that "the property in the hands of the Receiver has been and is not self-supporting and that the earnings, income and profits thereof have been and are insufficient to meet and defray the cost and expense incident thereto," etc., and that it would be to the interest of all the parties to have same sold at public auction.

Record, p. 27, fol. 47.

It then became evident to the Court that in view of the conflicting claims of Beckwith and the Receiver to the accounts due the latter for advertisements published by him, a sale of the interest of either would be futile as the purchaser would only buy a lawsuit. So it was that in moulding the decree of sale the Court provided for a sale of the accounts themselves and ordered the purchase money to stand in lieu of the property sold.

In view of the fact that the State and Federal Courts were exercising concurrent jurisdiction of the litigation, the decree provided that the sale should be made by E. B. McHenry and James B. Clough, as special commissioners. The former was the Clerk and Master of the Chancery Court, while the latter was the Clerk of the United States Circuit Court.

Record, p. 14, fol. 12.
Record, p. 29, fol. 51.
Record, p. 27, fol. 46.
Record, p. 29, fol. 50.

The decrees of sale were entered simultaneously in the Chancery and United States Circuit Courts and contained the jolliowng provisions:

"*All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will*

pass to and be acquired by the purchaser at this sale, who will become the full owner of the same."

It further provided that the purchaser should take the property subject to any contract obligations incurred by the Receiver, and to any claims of the Receiver for moneys personally advanced by him to the trust estate.

The decree then provided as follows:

"The purchaser at the sale herein ordered, will acquire the absolute title to all the property decreed to be sold, free from all claims, liens and encumbrances whatever, save as provided above as to the contract obligations of the Receiver; and the proceeds of the sale, will stand in these causes in lieu and place of the property itself."

Record, p. 28, fols. 48, 49.

Pursuant to said decrees the Commissioners on June 16, 1894, sold all the property of the insolvent corporation, including these accounts, at public auction, in the City of Memphis, when and where same was struck off to one West J. Crawford, for $65,200.00.

Record, p. 15, fol. 25.

On July 3, 1894, decrees were entered in the Chancery and United States Circuit Courts confirming said sale.

Record, p. 15, fol. 25.

At the time of making said various decrees said Chancery and United States Circuit Courts had jurisdiction of the subject matter of said various actions and of the parties thereto.

Record, p. 15, fol. 25.

Prior to the commencement of this action said West J. Crawford assigned to plaintiff in error all the rights against

defendant in error which he acquired at said sale of June 16, 1894.

Record, p. 15, fol. 26.

When plaintiff in error proceeded to collect these claims thus acquired by Crawford at the sale of June 16, 1894, it transpired that defendant in error had already collected same from the various debtors and had appropriated the money to his own use, claiming that it belonged to him and not to plaintiff in error.

Record, p. 14, fol. 23.

It will be noted that these moneys which defendant in error collected from these various debtors were paid to him by them "*in consideration of the publication of advertisements for their account in said Memphis Appeal-Avalanche, between Sept.* 30, 1893, *and June* 16, 1894, *while said Receiver was publishing said paper.*"

Record, p. 14, fol. 23.

In other words the very moneys which defendant in error collected and appropriated represent services rendered direct to said debtors by said receiver, or, to use the language of the record, "*in consideration of the publication* (by the receiver) *of advertisements for their account.*"

After the usual demand, plaintiff in error sued defendant in error in the Supreme Court of the State of New York for the conversion of these moneys. Plaintiff in error was in the first instance successful. At the trial Term a verdict was directed in its favor. This was affirmed by the Appellate Division of the Supreme Court, but the New York Court of Appeals reversed the courts below and ordered the complaint dismissed. On the remittitur being filed below, the Supreme Court entered a final judgment dismissing the complaint, hence this writ of error.

The Federal question here presented arises in a two-fold

aspect. 1st. So far as the court below refused to give validity to the decree of sale of the United States Circuit Court, and the sale made thereunder, or to recognize the rights of the purchaser thereby acquired, it presents a Federal question under Sec. 709 of the United States Revised Statutes as being an attack upon a title claimed under an authority exercised under the United States. 2nd. So far as the Court below refused to recognize the rights of the purchaser under the decrees of sale of the State and Federal Courts and the sale made thereunder, it presents a Federal question under Sec. 905 of the United States Revised Statutes, as being a refusal to give to the records and proceedings of the Chancery and United States Circuit Courts such faith and credit as they have by law or usage in the Courts of the State of Tennessee.

FIRST POINT.

The record presents a Federal question.

Plaintiff in error in its complaint clearly alleged that it claimed title to the moneys in question through the purchase of these advertising accounts by West J. Crawford, its assignor, at the judicial sale of June 16, 1894.

That sale having been made by two commissioners appointed for that purpose by decrees simultaneously entered in actions then depending in the State and Federal Courts to which defendant in error was a party, it became the duty of the Supreme Court of New Yorkto accord to them such faith and credit as they would have been entitled to by law or usage in the courts of Tennessee.

It would have been bad pleading for plaintiff in error to have alleged in his complaint that he relied upon any of the provisions of the Constitution or laws of the United

States, and for that reason proposed to present a Federal question to the New York Court.

When plaintiff in error went into the New York Court claiming title to these accounts as a purchaser thereof at a judicial sale made in an action pending in the Tennessee court to which defendant in error was a party, it followed as a matter of law from the facts pleaded that plaintiff in error was, so far as concerned the binding force of the Tennessee decrees entitled to the protection of the United States Constitution and laws which forbade the New York Court from questioning their validity provided they were valid in the State where they were rendered. The Supreme Court at the Trial Term and in the Appellate Division gave due effect to the Tennessee decrees, and it was not until the case reached the Court of Appeals that the mandate of the Federal Constitution and laws was ignored.

It is true that we have from the beginning contended thatBeckwith never had a shadow of interest in these accounts, and that, being the fruits of the operation of the newspaper by the Receiver, they were wholly the property of the latter. This is the question to which nearly all of the opinion of the New York Court of Appeals is addressed, and that Court has held that the original title of Beckwith was better than that of the Receiver. If this was the only question in the case, or if the decision of the Court of Appeals could conclude the controversy, this Court would be without jurisdiction.

But that question could only partially dispose of the rights of the parties, because it is but tributary to the larger one which I have discussed

The plaintiff in error represents the purchaser at the judicial sale under the decrees above mentioned. It was of no consequence to the purchaser whether the Receiver or Beckwith had the better title The proceedings advised him that both parties claimed the accounts, and the decrees of sale assured him that he would obtain the title of both,

and that the controversy between them would be transferred to the purchase money.

These facts guaranteed to the purchaser a good title, and it is the title thus acquired which plaintiff in error is seeking to maintain in this action

The New York Court of Appeals, passing to the other question, denied that the purchaser acquired title to these accounts at the sale in the following language :

"Under the judgment the purchaser became entitled to all the moneys due and owing to the Receiver by reason of the publication of the paper, but moneys that did not belong to the Receiver, or to which he was not entitled, did not pa s to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question."

Brief of ~~Plaintiff~~ Defendant in error, p. 20.

As the purchaser bought under the provisions of the decrees of sale I suppose it is those decrees which the Court of Appeals characterized as "the judgment." If this be so then the Court of Appeals in saying that the purchaser did not get title, because the moneys did not then belong to the receiver, ignored all the provisions of the decrees of sale which provided for a sale of the accounts themselves, and not the mere interest of one or the other of the contending parties.

The Court of Appeals seems to have discussed this question as though we had asserted that in the Tennessee litigation there had been an adjudication that the accounts belonged to the receiver and not to Beckwith, but we never made any claim of that kind. Our contention was that in view of these rival claims the Court, having jurisdiction of both parties, had sold the accounts themselves to Crawford, that the latter had paid full value for same, that the purchase money had been paid into Court to stand in lieu of the property sold, that the receiver or

Beckwith, as one or the other had the better title to the accounts, would get this money, and that the title thus acquired by Crawford was not to be disturbed by the bickerings of the two claimants.

The Court of Appeals must have misapprehended this question for this reason. The sale took place in June, 1894 (Record, p. 15, fol. 25). At that time the rights of the purchaser were fixed. Mr. Justice HAIGHT, however, in delivering the opinion of the Court of Appeals, says in that portion which I have quoted, "We find nothing in the *prior* decree that is an adjudication upon this question."

There was no "prior" decree, for the decrees of sale were made in the early part of the litigation, to wit, in April, 1894 (Record, p. 14, fol. 24), while the decree on final hearing was not made until March, 1896 (Record, p. 30, fol. 52), about two years later.

So we say that the Court of Appeals must have looked to the decree of March, 1896, in search of an adjudication of the respective claims of the Receiver and Beckwith to these moneys and finding none, come to the conclusion that we had obtained no rights in the Tennessee litigation. They could have reached this result only by overlooking the provisions of the decrees of sale made two years before and as these important decrees are not referred to, or noticed in any way, in the opinion of the Court of Appeals we are forced to the conclusion that they were overlooked.

So we now see that while plaintiff in error claimed title to these accounts under decrees made in the Courts of a sister State having jurisdiction of the parties, the New York Courts refused to give effect to these decrees. This then raises a Federal question and gives this Court jurisdiction.

The law governing this question was so clearly stated by the late Mr. Justice BRADLEY that I cannot forbear from quoting from his opinion. Said the learned Judge :

"Where a State Court refuses to give effect to the judgment of a Court of the United States rendered upon the

point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the Act of 1867 may be brought to this Court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction ; and hence it would be within the judicial power of the United States, as defined by the Constitution ; and it is clearly within the chart of appellate power given to this Court, over cases arising in and decided by the State Courts.

The refusal by the Courts of one State to give effect to the decisions of the Courts of another State is an infringement of a different article of the Constitution, to wit, the first section of Article four ; and the right to bring such a ca e before us by writ of error under the twenty-fifth section of the Judiciary Act, or the Act of 1867, is based on the refusal of the State Court to give validity and effect to the right claimed under that article and section.

In either case, therefore, whether the validity or due effect of a judgment of the State Court, or that of a judgment of a United States Court, is disallowed by a State Court, the Constitution and laws furnish redress by a final appeal to this Court."

Dupasseur *v.* Rochereau, 21 Wall., 130, 134.

Whether due effect has been given by a State Court to a judgment or decree of a Court of the United States, is a Federal question within the jurisdiction of this Court on a writ of error to the Supreme Court of the State.

Crescent City Live Stock Co. *vs.* Butchers Union, 120 U. S., 141, 146.

Central Nat Bk. *vs.* Stevens, 169, U. S., 432, 460.

"No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appear from the record that such rights were specially set up or claimed in the State Court in such manner as to bring it to the attention of that court."

It must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment. If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient (citing cases).

Green Bay &c. Co. *vs.* Patten, &c., Co., 172 U. S., 58, 67, 68.

The title under which we claim is a title derived under the decree of a Court of a sister State. This title is claimed under a "Statute of the United States" viz—Sec. 905 of the United States Revised Statutes which protects a title so derived.

Under Sec. 709 of the United States Revised Statutes it is this "title" which is to be "specially set up" and this we do by setting out in full our title and how derived under the Tennessee decree.

The language of Sec. 709 as applied to this question is as follows:

"Where any title * * * is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title * * * specially set up * * * by either party" the judgment may be reviewed in this Court.

So it follows that having specifically set out our title in the complaint we have specially set it up within the meaning of Section 709.

The well known case of Spies *vs.* Illinois, 123 U. S., 131, cited on this question by opposing counsel, has, we submit, no bearing on the subject under discussion. There certain persons had been

regularly convicted of crime in the State Courts of Illinois. Their counsel claimed that the acceptance of certain jurors and the admission of certain evidence infringed certain rights guaranteed to the prisoners by the Constitution and laws of the United States. But no claim of that kind was even suggested at the trial. This court therefore held that no Federal question had been "set up or claimed" within the provisions of the United States Revised Statutes.

In the case at bar we claim title as a purchaser under the decree of a court of a sister State, which decree is binding on the defendant in error under the Constitution and laws of the United States and (to quote from Green Bay &c., Co. *vs.* Patten &c. Co. (*supra*), the denial of that title "*was the necessary effect in law of the judgment.*"

It is undoubtedly the rule of this court that where no Federal question was raised below, and where the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, it is not the duty of this court to look into the record and determine whether the existence of such a claim was necessarily involved.

Eastern & Co. Association *vs.* Welling, 181 U. S., 47.

But the application of this rule always involves the examination of the facts of each case. The success or non-success of the plaintiff in error in the court of first instance, would have much to do with the question. Take the case at bar as an illustration. While the Federal question, as already stated, appears in the complaint where we allege title through a purchaser under the decree of a court of a sister State rendered in an action to which defendant in error was a party, yet had we been defeated in the trial court, we would naturally, by motions, exceptions, etc., have spread the Federal question in terms upon the record. But the trial court and the Appellate Division recognized our claim and found in our favor, so that there was no occasion for plaintiff

in error to set up the claim further than is shown by the complaint.

It must be borne in mind that in this case the New York Court of Appeals could not have given judgment dismissing the complaint without deciding the Federal question against plaintiff in error. While the greater portion of its opinion is devoted to the question of whether Beckwith or the receiver had, prior to the sale the better right to the accounts, yet this question was not controlling. The rule of this court where such a question has been decided by the State Court is as follows:

"If it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue, which is sufficient to maintain the judgment of the court without regard to the Federal question, then this court will reverse the judgment of the State Court and will either render such judgment here as the State Court should have rendered, or remand the case to that court as the circumstances of the case may require."

Murdock *vs.* City of Memphis, 20 Wall., 500, 636.

It is, perhaps, sufficient on this motion to show that the question of the binding force of the decrees of the Tennessee Courts was before the New York Court for decision, and that, therefore, this case presents a Federal question, but it is so easy to show the error of the New York Court in refusing to give to them their proper effect that a few words on that subject may not be amiss.

Defendant in error in his brief contends (p. 26) that the Tennessee Courts sold only the right, title and interest of the Receiver in these accounts. If this be so, I am quite ready to concede that there is no Federal question in this record, and that the writ of error should be dismissed.

This contention of defendant in error is, however, without merit. An inspection of the broadsides which Beck-

with and the Receiver were launching at each other during the incumbency of the latter, two of them being entitled in the action (Record, pp, 23, 24, fols. 39–42), shows, that with this bitter controversy existing between the parties, it would have been the height of folly for the Tennessee Courts to have sold the mere interest of either, for the simple reason that such a sale would have produced nothing. Experience teaches us that while purchasers at a judicial sale are ready to buy property, they are seldom willing to buy a lawsuit. Therefore, it was a wise exercise of judicial discretion for the Tennessee Courts to sell the accounts themselves, thereby making them bring their full value, and then leave the parties to contend over the purchase money.

But whether it was wise or unwise to sell the accounts themselves in this way, the fact remains that the Court did so, and as Beckwith was a party to that action, he cannot question the propriety of the decrees of sale. If dissatisfied with their terms he should have appealed therefrom, but this he did not do. He certainly cannot acquiesce in the decrees of sale, share in the proceeds and then turn around and attack the title of the purchaser.

But, says defendant in error in his brief (p. 26), the 13th paragraph of the agreed statement of fact shows that only the right, title and interest of the receiver was sold and this statement must dominate and determine the question. But is this a correct statement of the language of paragraph 13? Let us see.

Paragraph 12 (Record, p. 14, fol. 25) recites that in April, 1894, the decrees of sale above-mentioned were made and then goes on to say "A copy of the decrees thus entered in the said Chancery Court are hereto annexed marked Exhibits 5 and 6. The decrees entered in the Circuit Court of the United States were to the same effect."

These decrees as thus set out show on their face the provision that the accounts themselves should be sold, that the

purchaser should acquire a full title thereto free from all claims, and that the proceeds should stand in lieu of the property sold. These provisions have been quoted by me at pages 4 and 5 of this brief.

Now, with these decrees and these provisions for a sale of the accounts incorporated into paragraph 12, let us read paragraph 13, which begins as follows :

" That thereafter and on the 16th day of June, 1894, said Commissioners *acting under the decrees aforesaid* sold at public aution in the City of Memphis,*the property aforesaid*, and also all the right, title and interest of the Receiver," &c.

In other words, the decrees directed the Commissioners to sell the accounts themselves and not the interest of any particular person therein. In so selling they were " acting under the decrees aforesaid," they sold " the property aforesaid " *and* the interest of the Receiver therein. As a matter of course, a sale of the property itself carried not only the interest (if any) of the Receiver, but the interest (if any) of Beckwith as well.

The Commissioners could not have sold merely the bare interest of the Receiver when they sold " the property aforesaid," to wit, the property which the decrees directed them to sell.

The decrees of sale properly described the " accounts " of which the purchaser should become " *the full owner*," as " accounts which may be or are to become due to the Receiver by reason of the operation of the newspaper in his hands," for in any view of the case, they were in the first instance due the Receiver. All that Beckwith ever claimed was the right to collect them and apply them on his claim against the defunct corporation. That this language was intended to describe the accounts themselves and not the mere interest of the Receiver therein, is shown by the further provision of the decrees, which directed that the proceeds of sale stand in lieu of the property sold.

It must be borne in mind that the plaintiff in error does not claim under either Beckwith or the Receiver, but under a stranger, who, relying upon the provisions of the decrees of sale assuring a good title to the purchaser, went to the sale, and paid $65,200.00 for the property, in which sum of money defendant in error had the right to litigate with the Receiver his claim to these accounts, for by the terms of the decrees of sale the proceeds of sale were to stand "in lieu and place of the property itself."

A title thus acquired is safe against the assaults of one who was a party to the action in which the decree of sale was made. If this were not so we should have the owner of the equity of redemption, and who was a party to an action of foreclosure, bringing ejectment against the purchaser after the latter had paid his money and gone into possession.

This question has been discussed in this Court. One of the earlier cases which has been already referred to is

Dupasseur *vs.* Rochereau, 21 Wall., 130.

There one Dupasseur bought certain real estate at a sale by the Marshal of the Circuit Court of the United States for the Eastern District of Louisiana. One Rochereau thereafter sued for the land, and Dupasseur defended on the ground that Rochereau was bound by the decree of sale. *Rochereau was not, however, a party to the action in which the sale was had.*

This Court said: "We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a State Court. We have examined this question with some care, and have come to the conclusion that it would not" (p. 135).

"We think that Rochereau was not concluded by the judgment of the Circuit Court, because he was not a party to it. Therefore, the State Court, in not regarding the decision of the

Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect."

If Rochereau had been a party to the Louisiana action as Beckwith was to the Tennessee suit this Court would undoubtedly have upheld the title of the purchaser at the Marshal's sale.

To the same effect are

Factors, &c. Co. *vs.* Murphy, 111 U. S., 738.
Pittsburg *vs.* Long Island, 172 U. S., 493.
Avery *vs.* Popper, 179 U. S. 305.

Defendant in error also asserts that he could not have been legally a party to the actions which were consolidated with the Gwynne suit, but the record shows that the consolidation was made *on motion of the plaintiff in the Gwynne suit* (Record p. 26, fol. 45). But beyond all this, the decree of sale entered in the consolidated actions must have necessarily been entered in the Gwynne action to which he was confessedly a party. Further than this we find him two years later a party to the consolidated actions, having filed a cross bill therein (Record p. 31, fol. 54) and praying an appeal from a part of the final decree (Record p. 36, fol. 61).

A Federal question identical with the one here discussed, arose in the same way in the leading case of Crapo *vs.* Kelly, 16 Wall., 610.

It seems almost superfluous to restate the facts of a case so celebrated, but a brief summary thereof may be useful in order to compare that case with this.

On March 6, 1861, Gibbs & Jenny, citizens of Massachusetts, were declared insolvent under the laws of that State, whereupon the judge of the insolvent court of Massachusetts appointed Crapo and others assignees and executed and delivered to them an assignment of all the personal property of the insolvents. No assignment was made by the insolvents themselves.

At that time, the insolvents owned an interest in the ship *Arctic*, then in the Pacific Ocean.

On April 30, 1861, the ship entered the port of New York and

was immediately attached by Kelly, sheriff of the county of New York, at the suit of Robinson, a New York creditor of the insolvents. Thereupon Crapo and his co-assignees appeared and demanded the property, claiming title under the Massachusetts assignment and same was turned over to them on giving a forthcoming bond.

Kelly sued Crapo *et al.* on the bond in the New York courts, claiming title under the attachment and Crapo *et al.* defended, claiming title under the Massachusetts decree of insolvency.

The New York Courts sustained the Sheriff's title. Crapo *et al.* sued out a writ of error to this Court, and Kelly moved to dismiss on the ground that no Federal question was involved. Mr. Justice Hunt, in delivering the opinion of this Court said, "Without reference to whether Crapo was right or wrong, whether the question was *res integra* or *res adjudicata*, the fact that he claimed title under the Massachusetts record, and that his claim was overruled, gives the Court jurisdiction of the present case."

The Crapo case in its facts and the principles involved is strikingly like the case at bar. There the Sheriff had seized the property itself, here defendant had collected the accounts, which is the same thing. There Crapo, a citizen of Massachusetts, claimed title to the property under the decree of a Massachusetts Court, here the plaintiff, a citizen of Tennessee, claims title to these accounts under the decree of a Tennessee Court. There the title claimed under the Massachusetts decree was rejected by the New York Court, here the title claimed under the Tennessee decree was likewise rejected by the New York Court. There this Court held that the facts presented a Federal question, here we confidently expect that this Court will make a similar ruling.

Crapo *v.* Kelly was cited and followed in Huntington *v.* Attrell, 146 U. S., 657, 666, where this Court, speaking through Mr. Justice Gray, said:

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this Court has jurisdiction on this writ of error."

Finally, in 1899, the question came before this Court in concrete form in the case of

Hancock Nat. Bk. *v.* Farnum. 176 U. S., 640.

There the plaintiff, who had recovered a judgment against the Commonwealth Loan & Trust Company in the Courts of Kansas on which execution had been returned *nulla bona*, sued defendant, who was a stockholder, in the Courts of Rhode Island, for a sum equal to the amount of his stock, claiming that he was bound by the Kansas judgment. The Rhode Island Court held against this contention, and thereupon the plaintiff came to this Court by writ of error. This Court, in discussing the question, said, per Mr. Justice Brewer:

"The Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that Congress may not only prescribe the mode of authentication but also the effect thereof. Section 905 prescribes such mode, and adds that the "records and judicial proceedings so authenticated, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken. Such is the Congressional declaration of the effect to be given to the records and judicial proceedings of one State in the Courts of every other State. In other words, the local effect must be recognized everywhere through the United States" (p. 642).

The Court then adds in applying the rule to the case in hand:

"As the judgment was valid, the Court committed error in allowing the defendant to go behind it and contest matters which were conclusively settled by the judgment against the corporation" (p. 643).

A case very much in point is that of

Dowell *vs.* Applegate, 152 U. S., 327.

The facts in that case were as follows: On January 5, 1883,

there was pending in the Circuit Court of the United States for the District of Oregon, a suit in Equity brought by Dowell against Jesse Applegate, William H. H. Applegate, Daniel W. Applegate and others, praying that a conveyance of certain lands from Jesse to William and Daniel be set aside as fraudulent and the land sold. A decree was entered accordingly. The land was sold under said decree on April 26, 1883, and Dowell became the purchaser. The sale was confirmed and on December 6, 1883, the master made a deed to Dowell.

Three years later Daniel Applegate, claiming under a deed made to him by William Applegate in 1874, brought a suit in the State Court against Dowell to obtain a decree removing the cloud upon his alleged title created by the master's deed of December 6, 1883.

Dowell naturally answered, setting up his title under the decree of April 26, 1883, and the sale had thereunder.

The State Court found in favor of Applegate, and Dowell came to this Court by writ of error.

This Court, after narrating the facts at considerable length, state the questions to be determined as follows (p. 335):

"From this history of the litigation between the parties, it appears that Dowell, in his answer in this suit, asserted his right to the forty acres in dispute under and by virtue of the decree and proceedings in the Circuit Court of the United States. That right having been denied by the judgment of the Supreme Court of Oregon, affirming the judgment of the Circuit Court of Douglas County, it is necessary to inquire:

First.—Whether the decree and proceedings in the Federal Court were, as claimed, void for the want of jurisdiction to hear and determine the suit which was instituted by Dowell in the Circuit Court of Douglas County,, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon.

Secondly.—Whether if such decree and proceedings were not

void, the State Court gave due effect to them, when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States."

After stating its reasons the Court announced its conclusions as follows:

"For the reasons given we are unable to concur in the views expressed by the State Court as to the effect to be given to the decree of the Federal Court. We are of opinion that due legal effect is not accorded to it, unless it be adjudged, as this Court does now adjudge, that never having been modified and being in full force and unreversed when the present suit was instituted, that decree conclusively establishes, as between Dowell and Daniel W. Applegate, that the former was entitled to have the lands now in dispute sold for his demands: and consequently, that the title acquired by Dowell, under that decree, cannot be here questioned by Applegate."

By reference to the printed record of above case (No. 209 of October Term, 1893, Record case No. 14196), it will be observed that nowhere in the answer of Dowell is there one word which in terms sets up any right or title under the Constitution or laws of the United States, but as in the case of the plaintiff in error in the case at bar he pleads facts from which such right and title must inevitably flow.

Second Point.

Under the law of Tennessee Crawford obtained at the sale of June 16, 1894, a title to the accounts which neither the Receiver nor Beckwith could thereafter question.

The Supreme Court of Tennessee has declared that the

Chancery Court of Shelby County is a Court of general jurisdiction, and that where it has jurisdiction of the parties and the subject matter and orders the sale of property, the purchaser, being a stranger to the record, has a right to assume that the decree of sale is regular and valid and his title cannot be affected by objections made for the first time after he has purchased and paid the purchase money.

Blanz *vs.* Blain, 95 Tenn., 87, 91.
Anderson *vs.* Ammonett, 9 Lea, 1, 11.
Greenlaw *vs.* Greenlaw, 16 Lea, 435.

Under the practice in Tennessee, property in the hands of a Receiver may be sold *pendente lite*, especially if it is likely to deteriorate in value as was the newspaper plant in the Tennessee suit.

Gleaves *vs.* Ferguson, 2 Shannon's (Tenn.) Cases, 560.

Crawford's title being thus perfect under the law of Tennessee, it was the duty of the New York Court to accord to it like force and effect, and its failure so to do gives the Court jurisdiction to correct the error.

It is respectfully submitted that the motion to dismiss or affirm should be denied.

Dated New York, Oct. 21, 1901.

A. WALKER OTIS,
Counsel for ~~Defendant~~ Plaintiff in Error.

Supreme Court of the United States.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff-in-Error,

vs.

SAMUEL C. BECKWITH,
Defendant-in-Error.

No. 139.
October Term,
1902.

Brief for Plaintiff-in-Error.

This is a writ of error granted by Mr. Justice Peckham (fol. 100), to review a judgment of the Supreme Court of New York, entered on a remittitur from the New York Court of Appeals, which reversed a judgment for $5,655.14, theretofore entered in favor of plaintiff, and dismissed the complaint with costs (fol. 80).

A motion to dismiss or affirm was made by defendant-in-error at the last term of this Court, and same was postponed to the hearing of the case on its merits.

Facts.

In September, 1893, there was in existence at Memphis, Tennessee, a corporation organized under the laws of Tennessee called the Memphis Appeal Com-

pany, which was engaged in the publication at the City of Memphis of a newspaper known as the Memphis *Appeal-Avalanche.*

Record, p. 11, fol. 19.

In September, 1893, a suit in equity was bronght in the Chancery Court of Shelby County, Tennessee, by one Gwynne and others against said Memphis Appeal Company and others. Samuel C Beckwith, the defendant-in-error herein, was a party defendant to that suit.

Record, p. 13, fol. 22.

On September 30, 1893, a decree was entered in the Gwynne suit appointing one Chase receiver of the property of said Memphis Appeal Company and directing him to continue the publication of said newspaper under the direction of the Court. Said receiver qualified and published the newspaper as such receiver from September 30, 1893, to June 16, 1894.

Record, p. 13, fol. 22.

Between September 30, 1893, and June 16, 1894, said receiver published in said newspaper advertisements for account of the various parties mentioned in Exhibit B, amounting in value to $3,902.74.

Record, p. 13, fol. 23.

On October 5, 1893, a petition for removal to the Circuit Court of the United States for the western division of the Western District of Tennessee, was filed by Beckwith in the Gwynne suit on the ground that as to him a separable controversy existed, and thereupon the State and Federal Court acquired and exercised concurrent jurisdiction of said cause.

Record, p. 14, fol. 24.

Early in November, 1893, one Fink brought a general creditor's bill against the Memphis Appeal Company for the purpose of winding it up as an insolvent corporation. Other suits were also brought against said Memphis Appeal Company. In January, 1894, all the pending suits, including that of Gwynne, were consolidated into one action.

Record, p. 14, fol. 24.
Record, p. 25, fol. 43.
Record, p. 26, fol. 45.

The consolidated action went to final decree on March 26, 1896, and from a portion of said decree said Beckwith prayed and was allowed an appeal.

Record, p. 15, fol. 26.
Record, p. 30, fol. 52.
Record, p. 36, fol. 61.

Said decree of March 26, 1896, was affirmed with some modifications by the Supreme Court of Tennessee, and thereupon under the procedendo from the Supreme Court a decree was entered on July 8, 1896, distributing the assets of the insolvent corporation among its creditors.

Record, p, 36, fol. 62.
Record, p. 15, fol. 26.

While the receiver was publishing the advertisements in question, a warfare of words was being carried on between Beckwith and the receiver relative thereto. Beckwith insisted that by virtue of a contract which he had made with the insolvent corporation more than two years before he had the right to collect the moneys due the Receiver for advertising and apply same on a claim which he held against the corporation. The Receiver

on the other hand contended that he was in charge of the newspaper as Receiver, and that it was his duty to secure to the trust estate the revenues derived by him therefrom. Thereupon Beckwith notified the Receiver that he repudiated all rights claimed by said Receiver in the premises.

Record, p. 13, fol. 23.
Record, p. 23, fol. 39.
Record, p. 24, fol. 41.
Record, p. 25, fol. 42.

It appears by the record that the newspaper was not self-sustaining while published by the Receiver and that he was obliged to issue Receiver's certificates in order to carry it on.

Record, p. 27, fol. 47.
Record, p. 22, fol. 37.

As stated, the consolidated causes were not heard and disposed of until March, 1896. Some two years before the hearing and in April, 1894, the Court found that "the property in the hands of the Receiver has been and is not self-supporting and that the earnings, income and profits thereof have been and are insufficient to meet and defray the cost and expense incident thereto," etc., and that it would be to the interest of all the parties to have same sold at public auction.

Record, p. 27, fol. 47.

It then became evident to the Court that in view of the conflicting claims of Beckwith and the Receiver to the accounts due the latter for advertisements published by him, a sale of the interest of either would be futile as the purchaser would only buy a lawsuit. So it was that in moulding the decree of sale the Court provided for a sale of the accounts themselves and

ordered the purchase money to stand in lieu of the property sold.

In view of the fact that the State and Federal Courts were exercising concurrent jurisdiction of the litigation, the decree provided that the sale should be made by E. B. McHenry and James B. Clough, as special commissioners. The former was the Clerk and Master of the Chancery Court, while the latter was the Clerk of the United States Circuit Court.

Record, p. 14, fol. 12.
Record, p. 29, fol. 51.
Record, p. 27, fol. 46.
Record, p. 29, fol. 50.

The decrees of sale were entered simultaneously in the Chancery and United States Circuit Courts and contained the following provisions:

"*All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same.*"

It further provided that the purchaser should take the property subject to any contract obligations incurred by the Receiver, and to any claims of the Receiver for moneys personally advanced by him to the trust estate.

The decree then provided as follows:

"*The purchaser at the sale herein ordered, will acquire the absolute title to all the property decreed to be sold, free from all claims, liens and encumbrances whatever, save as provided above as to the contract obligations of the Receiver; and the proceeds of the sale,*

will stand in these causes in lieu and place of the property itself."

Record, p. 28, fols. 48, 49.

Pursuant to said decrees the Commissioners on June 16, 1894, sold all the property of the insolvent corporation, including these accounts, at public auction, in the City of Memphis, when and where same was struck off to one West J. Crawford, for $65,200.00.

Record, p. 15, fol. 25.

On July 3, 1894, decrees were entered in the Chancery and United States Circuit Courts confirming said sale.

Record, p. 15, fol. 25.

At the time of making said various decrees said Chancery and United States Circuit Courts had jurisdiction of the subject matter of said various actions and of the parties thereto.

Record, p. 15, fol. 25.

Prior to the commencement of this action said West J. Crawford assigned to plaintiff in error all the rights against defendant in error which he acquired at said sale of June 16, 1894.

Record, p. 15, fol. 26.

When the plaintiff in error proceeded to collect these claims thus acquired by Crawford at the sale of June 16, 1894, it transpired that defendant in error had already collected same from the various debtors and had appropriated the money to his own use, claiming that it belonged to him and not to plaintiff in error.

Record, p. 14, fol. 23.

It will be noted that these moneys which defendant in error collected from these various debtors were paid to him by them "*in consideration of the publication of advertisements for their account in said Memphis Appeal-Avalanche, between Sept. 30, 1893, and June 16, 1894, while said Receiver was publishing said paper.*"

Record, p. 14, fol. 23.

In other words, the very moneys which defendant in in error collected and appropriated represent services rendered direct to said debtors by said Receiver, or, to use the language of the record, "*in consideration of the publication* (by the Receiver) *of advertisements for their account.*"

After the usual demand, plaintiff in error sued defendant in error in the Supreme Court of the State of New York for the conversion of these moneys. Plaintiff in error was in the first instance successful. At the Trial Term a verdict was directed in its favor. This was affirmed by the Appellate Division of the Supreme Court, but the New York Court of Appeals reversed the Courts below and ordered the complaint dismissed. On the remittitur being filed below, the Supreme Court entered a final judgment dismissing the complaint, hence this writ of error.

The Federal question here presented arises in a twofold aspect. 1st. So far as the court below refused to give validity to the decree of sale of the United States Circuit Court, and the sale made thereunder, or to recognize the rights of the purchaser thereby acquired, it presents a Federal question under Sec. 709 of the United States Revised Statutes as being an attack upon a title claimed under an authority exercised under the United States. 2nd. So far as the Court below refused to recognize the rights of the purchaser under the decrees of sale of the State and Federal Courts and the

sale made thereunder, it presents a Federal question under Sec. 905 of the United States Revised Statutes, as being a refusal to give to the records and proceedings of the Chancery and United States Circuit Courts such faith and credit as they have by law or usage in the Courts of the State of Tennessee.

FIRST POINT.

The record presents a Federal question.

Plaintiff in error in its complaint clearly alleged that it claimed title to the moneys in question through the purchase of these advertising accounts by West J. Crawford, its assignor, at the judicial sale of June 16, 1894.

That sale having been made by two commissioners appointed for that purpose by decrees simultaneously entered in actions then depending in the State and Federal Courts to which defendant in error was a party, it became the duty of the Supreme Court of New York to accord to them such faith and credit as they would have been entitled to by law or usage in the courts of Tennessee.

It would have been bad pleading for plaintiff in error to have alleged in his complaint that he relied upon any of the provisions of the Constitution or laws of the United States, and for that reason proposed to present a Federal question to the New York Court.

When plaintiff in error went into the New York Court claiming title to these accounts as a purchaser thereof at a judicial sale made in an action pending in the Tennessee Court to which defendant in error was a party, it followed as a matter of law from the facts pleaded

that plaintiff in error was, so far as concerned the binding force of the Tennessee decrees entitled to the protection of the United States Constitution and laws which forbade the New York Court from questioning their validity provided they were valid in the State where they were rendered. The Supreme Court at the Trial Term and in the Appellate Division gave due effect to the Tennessee decrees, and it was not until the case reached the Court of Appeals that the mandate of the Federal Constitution and laws was ignored.

It is true that we have from the beginning contended that Beckwith never had a shadow of interest in these accounts, and that, being the fruits of the operation of the newspaper by the Receiver, they were wholly the property of the latter. This is the question to which nearly all of the opinion of the New York Court of Appeals is addressed, and that Court has held that the original title of Beckwith was better than that of the Receiver. If this was the only question in the case, or if the decision of the Court of Appeals could conclude the controversy, this Court would be without jurisdiction.

But that question could only partially dispose of the rights of the parties, because it is but tributary to the larger one which we have discussed.

The plaintiff in error represents the purchaser at the judicial sale under the decrees above mentioned. It was of no consequence to the purchaser whether the Receiver or Beckwith had the better title. The proceedings advised him that both parties claimed the accounts, and the decrees of sale assured him that he would obtain the title of both, and that the controversy between them would be transferred to the purchase money.

These facts guaranteed to the purchaser a good title,

and it is the title thus acquired which plaintiff in error is seeking to maintain in this action.

The New York Court of Appeals, passing to the other question, denied that the purchaser acquired title to these accounts at the sale in the following language :

"Under the judgment the purchaser became entitled to all the moneys due and owing to the Receiver by reason of the publication of the paper, but moneys that did not belong to the Receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question."

As the purchaser bought under the provisions of the decrees of sale we suppose it is those decrees which the Court of Appeals characterized as "the judgment." If this be so then the Court of Appeals in saying that the purchaser did not get title, because the moneys did not then belong to the receiver, ignored all the provisions of the decrees of sale which provided for a sale of the accounts themselves, and not the mere interest of one or the other of the contending parties.

The Court of Appeals seems to have discussed this question as though we had asserted that in the Tennessee litigation there had been an adjudication that the accounts belonged to the receiver and not to Beckwith, but we never made any claim of that kind. Our contention was that in view of these rival claims the Court, having jurisdiction of both parties, had sold the accounts themselves to Crawford, that the latter had paid full value for same, that the purchase money had been paid into Court to stand in lieu of the property sold, that the receiver or Beckwith, as one or the other had the better title to the accounts, would get this money, and that the title thus acquired by Crawford was not to be disturbed by the bickerings of the two claimants.

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The Court of Appeals must have misapprehended this question for this reason. The sale took place in June, 1894 (Record, p. 15, fol. 25). At that time the rights of the purchaser were fixed. Mr. Justice HAIGHT, however, in delivering the opinion of the Court of Appeals, says in that portion which I have quoted, "We find nothing in the *prior* decree that is an adjudication upon this question."

There was no "prior" decree, for the decrees of sale were made in the early part of the litigation, to wit, in April, 1894 (Record, p. 14, fol. 24), while the decree on final hearing was not made until March, 1896 (Record, p. 30, fol. 52), about two years later.

So we say that the Court of Appeals must have looked to the decree of March, 1896, in search of an adjudication of the respective claims of the Receiver and Beckwith to these moneys, and finding none, come to the conclusion that we had obtained no rights in the Tennessee litigation. They could have reached this result only by overlooking the provisions of the decrees of sale made two years before, and as these important decrees are not referred to, or noticed in any way, in the opinion of the Court of Appeals we are forced to the conclusion that they were overlooked.

So we now see that while plaintiff in error claimed title to these accounts under decrees made in the Courts of a sister State having jurisdiction of the parties and subject-matter the New York Court refused to give effect to these decrees. This then raises a Federal question and gives this Court jurisdiction.

The law governing this question was so clearly stated by the late Mr. Justice BRADLEY that we cannot forbear from quoting from his opinion. Said the learned Judge:

"Where a State Court refuses to give effect to the judgment of a Court of the United States rendered

upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised, which under the Act of 1867 may be brought to this Court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction ; and hence it would be within the judicial power of the United States, as defined by the Constitution ; and it is clearly within the chart of appellate power given to this Court, over cases arising in and decided by the State Courts.

The refusal by the Courts of one State to give effect to the decisions of the Courts of another State is an infringement of a different article of the Constitution, to wit, the first section of Article four ; and the right to bring such a case before us by writ of error under the twenty-fifth section of the Judiciary Act, or the Act of 1867, is based on the refusal of the State Court to give validity and effect to the right claimed under that article and section.

In either case, therefore, whether the validity or due effect of a judgment of the State Court, or that of a judgment of a United States Court, is disallowed by a State Court, the Constitution and laws furnish redress by a final appeal to this Court."

Dupasseur *v.* Rochereau, 21 Wall., 130, 134.

Whether due effect has been given by a State Court to a judgment or decree of a Court of the United States, is a Federal question within the jurisdiction of this

Court on a writ of error to the Supreme Court of the State.

Crescent City Live Stock Co. *v.* Butchers' Union, 120 U. S., 141, 146.
Central Nat. Bk. *v.* Stevens, 169 U. S., 432, 460.

"No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appear from the record that such rights were specially set up or claimed in the State Court in such manner as to bring it to the attention of that court."

It must appear from the record of the case either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment. If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient (citing cases).

Green Bay &c. Co. *v.* Patten, &c., Co., 172 U. S., 58, 67, 68.

The title under which we claim is a title derived under the decree of a Court of a sister State. This title is claimed under a "Statute of the United States" viz. —Sec. 905 of the United States Revised Statutes, which protects a title so derived.

Under Sec. 709 of the United States Revised Statutes it is this "title" which is to be "specially set up," and this we do by setting out in full our title and how derived under the Tennessee decree.

The language of Sec. 709 as applied to this question is as follows :

"Where any title * * * is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title * * * specially set up * * * by either party" the judgment may be reviewed in this Court.

So it follows that having specifically set out our title in the complaint we have specially set it up within the meaning of Section 709.

The well known case of Spies *vs.* Illinois, 123 U. S., 131, cited on this question by opposing counsel, has, we submit, no bearing on the subject under discussion. There certain persons had been regularly convicted of crime in the State Courts of Illinois. Their counsel claimed that the acceptance of certain jurors and the admission of certain evidence infringed certain rights guaranteed to the prisoners by the Constitution and laws of the United States. But no claim of that kind was even suggested at the trial. This court therefore held that no Federal question had been "set up or claimed" within the provisions of the United States Revised Statutes.

In the case at bar we claim title as a purchaser under the decree of a court of a sister State, which decree is binding on the defendant in error under the Constitution and laws of the United States and (to quote from Green Bay, &c., Co. *vs.* Patten, &c., Co. (*supra*), the denial of that title "*was the necessary effect in law of the judgment.*"

It is undoubtedly the rule of this court that where no Federal question was raised below, and where the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, it is not the duty of this court to look into the record and determine whether the existence of such a claim was necessarily involved.

Easton & Co. Association *vs.* Welling, 181 U. S., 47.

But the application of this rule always involves the examination of the facts of each case. The success or non-success of the plaintiff in error in the court of first instance, would have much to do with the question. Take the case at bar as an illustration. While the Federal question, as already stated, appears in the complaint where we allege title through a purchaser under the decree of a court of a sister State rendered in an action to which defendant in error was a party, yet had we been defeated in the trial court, we would naturally, by motions, exceptions, etc., have spread the Federal question in terms upon the record. But the trial court and the Appellate Division recognized our claim and found in our favor, so that there was no occasion for plaintiff in error to set up the claim further than is shown by the complaint.

It must be borne in mind that in this case the New York Court of Appeals could not have given judgment dismissing the complaint without deciding the Federal question against plaintiff in error. While the greater portion of its opinion is devoted to the question of whether Beckwith or the receiver had, prior to the sale the better right to the accounts, yet this question was not controlling. The rule of this court where such a question has been decided by the State Court is as follows:

"If it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue, which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State Court and will either render such judgment here as the State Court should have rendered,

or remand the case to that court as the circumstances of the case may require."

Murdock *vs.* City of Memphis, 20 Wall., 500, 636.

Defendant in error contends that the Tennessee Courts sold only the right, title and interest of the Receiver in these accounts. If this be so, we are quite ready to concede that there is no Federal question in this record, and that the writ of error should be dismissed.

This contention of defendant in error is, however, without merit. An inspection of the broadsides which Beckwith and the Receiver were launching at each other during the incumbency of the latter, two of them being entitled in the action (Record, pp. 23, 24, fols. 39–42), shows, that with this bitter controversy existing between the parties, it would have been the height of folly for the Tennessee Courts to have sold the mere interest of either, for the simple reason that such a sale would have produced nothing. Experience teaches us that while purchasers at a judicial sale are ready to buy property, they are seldom willing to buy a lawsuit. Therefore, it was a wise exercise of judicial discretion for the Tennessee Courts to sell the accounts themselves, thereby making them bring their full value, and leave the parties to contend over the purchase money.

But whether it was wise or unwise to sell the accounts themselves in this way, the fact remains that the Court did so, and as Beckwith was a party to that action, he cannot question the propriety of the decrees of sale. If dissatified with their terms he should have appealed therefrom, but this he did not do. He certainly cannot acquiesce in the decrees of sale, share in the proceeds and then turn around and attack the title of the purchaser.

Defendant in error contends that the 13th paragraph of the agreed statement of facts shows that only the right, title and interest of the Receiver was sold, and this statement must dominate and determine the question. But is this a correct statement of the language of paragraph 13? Let us see.

Paragraph 12 (Record, p. 14, fol. 25) recites that in April, 1894, the decrees of sale above-mentioned were made, and then goes on to say "A copy of the decrees thus entered in the said Chancery Court are hereto annexed marked Exhibits 5 and 6. The decrees entered in the Circuit Court of the United States were to the same effect."

These decrees as thus set out show on their face the provision that the accounts themselves should be sold, that the purchaser should acquire a full title thereto free from all claims, and that the proceeds should stand in lieu of the property sold. These provisions have been quoted by us at pages 4 and 5 of this brief.

Now, with these decrees and these provisions for a sale of the accounts incorporated into paragraph 12, let us read paragraph 13, which begins as follows:

"That thereafter and on the 16th day of June, 1894, said Commissioners *acting under the decrees aforesaid* sold at public auction in the City of Memphis, *the property aforesaid*, and also all the right, title and interest of the Receiver," &c.

In other words, the decrees directed the Commissioners to sell the accounts themselves and not the interest of any particular person therein. In so selling they were "acting under the decrees aforesaid," they sold "the property aforesaid" *and* the interest of the Receiver therein. As a matter of course, a sale of the property itself carried not only the interest (if any)

of the Receiver, but the interest (if any) of Beckwith as well.

The Commissioners could not have sold merely the bare interest of the Receiver when they sold "the property aforesaid," to wit, the property which the decrees directed them to sell.

The decrees of sale properly described the "accounts" of which the purchaser should become "*the full owner*," as "accounts which may be or are to become due to the Receiver by reason of the operation of the newspaper in his hands," for in any view of the case, they were in the first instance due the Receiver. All that Beckwith ever claimed was the right to collect them and apply them on his claim against the defunct corporation. That this language was intended to describe the accounts themselves and not the mere interest of the Receiver therein, is shown by the further provision of the decrees, which directed that the proceeds of sale stand in lieu of the property sold.

It must be borne in mind that the plaintiff in error does not claim under either Beckwith or the Receiver, but under a stranger, who, relying upon the provisions of the decrees of sale assuring a good title to the purchaser, went to the sale, and paid $65,200.00 for the property, in which sum of money defendant in error had the right to litigate with the Receiver his claim to these accounts, for by the terms of the decrees of sale the proceeds of sale were to stand "in lieu and place of the property itself."

A title thus acquired is safe against the assaults of one who was a party to the action in which the decree of sale was made. If this were not so we should have the owner of the equity of redemption, and who was a party to an action of foreclosure, bringing ejectment against the purchaser after the latter had paid his money and gone into possession.

This question has been discussed in this Court. One of the earlier cases which has been already referred to is

Dupasseur *vs.* Rochereau, 21 Wall., 130.

There one Dupasseur bought certain real estate at a sale by the Marshal of the Circuit Court of the United States for the Eastern District of Louisiana. One Rochereau thereafter sued for the land, and Dupasseur defended on the ground that Rochereau was bound by the decree of sale. *Rochereau was not, however, a party to the action in which the sale was had.*

This Court said : " We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a State Court. We have examined this question with some care, and have come to the conclusion that it would not" (p. 135).

" We think that Rochereau was not concluded by the judgment of the Circuit Court, because he was not a party to it. Therefore, the State Court, in not regarding the decision of the Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect."

If Rochereau had been a party to the Louisiana action as Beckwith was to the Tennessee suit this Court would undoubtedly have upheld the title of the purchaser at the Marshal's sale.

To the same effect are

Factors, &c. Co. *vs.* Murphy, 111 U. S., 738.
Pittsburg *vs.* Long Island, 172 U. S., 493.
Avery *vs.* Popper, 179 U. S., 305.

Defendant in error also asserts that he could not have been legally a party to the actions which were con-

solidated with the Gwynne suit, but the record shows that the consolidation was made *on motion of the plaintiff in the Gwynne suit* (Record, p. 26, fol. 45). But beyond all this, the decree of sale entered in the consolidated actions must have necessarily been entered in the Gwynne action to which he was confessedly a party. Further than this we find him two years later a party to the consolidated actions, having filed a cross bill therein (Record, p. 31, fol. 54) and praying an appeal from a part of the final decree (Record, p. 36, fol. 61).

A Federal question identical with the one here discussed, arose in the same way in the leading case of Crapo *vs.* Kelly, 16 Wall., 610.

It seems almost superfluous to restate the facts of a case so celebrated, but a brief summary thereof may be useful in order to compare that case with this.

On March 6, 1861, Gibbs & Jenny, citizens of Massachusetts, were declared insolvent under the laws of that State, whereupon the Judge of the insolvent Court of Massachusetts appointed Crapo and others assignees and executed and delivered to them an assignment of all the personal property of the insolvents. No assignment was made by the insolvents themselves.

At that time, the insolvents owned an interest in the ship *Arctic*, then in the Pacific Ocean.

On April 30, 1861, the ship entered the port of New York, and was immediately attached by Kelly, sheriff of the County of New York, at the suit of Robinson, a New York creditor of the insolvents. Thereupon Crapo and his co-assignees appeared and demanded the property, claiming title under the Massachusetts assignment and same was turned over to them on giving a forthcoming bond.

Kelly sued Crapo *et al.* on the bond in the New York Courts, claiming title under the attachment and Crapo

et al. defended, claiming title under the Massachusetts decree of insolvency.

The New York Courts sustained the Sheriff's title. Crapo *et al.* sued out a writ of error to this Court, and Kelly moved to dismiss on the ground that no Federal question was involved. Mr. Justice Hunt, in delivering the opinion of this Court said, "Without reference to whether Crapo was right or wrong, whether the question was *res integra* or *res adjudicata*, the fact that he claimed title under the Massachusetts record, and that his claim was overruled, gives the Court jurisdiction of the present case."

The Crapo case in its facts and the principles involved is strikingly like the case at bar. There the Sheriff had seized the property itself, here defendant had collected the accounts, which is the same thing. There Crapo, a citizen of Massachusetts, claimed title to the property under the decree of a Massachusetts Court, here the plaintiff, a citizen of Tennessee, claims title to these accounts under the decree of a Tennessee Court. There the title claimed under the Massachusetts decree was rejected by the New York Court, here the title claimed under the Tennessee decree was likewise rejected by the New York Court. There this Court held that the facts presented a Federal question, here we confidently expect that this Court will make a similar ruling.

Crapo *v.* Kelly was cited and followed in Huntington *v.* Attrell, 146 U. S., 657, 666, where this Court, speaking through Mr. Justice GRAY, said:

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this Court has jurisdiction on this writ of error."

Finally, in 1899, the question came before this Court in concrete form in the case of

Hancock Nat. Bk. *v.* Farnum, 176 U. S., 640.

There the plaintiff, who had recovered a judgment against the Commonwealth Loan & Trust Company in the Courts of Kansas on which execution had been returned *nulla bona*, sued defendant, who was a stockholder, in the Courts of Rhode Island, for a sum equal to the amount of his stock, claiming that he was bound by the Kansas judgment. The Rhode Island Court held against this contention, and thereupon the plaintiff came to this Court by writ of error. This Court, in discussing the question, said, per Mr. Justice BREWER:

"The Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that Congress may not only prescribe the mode of authentication but also the effect thereof. Section 905 prescribes such mode, and adds that the "records and judicial proceedings so authenticated, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they were taken. Such is the Congressional declaration of the effect to be given to the records and judicial proceedings of one State in the Courts of every other State. In other words, the local effect must be recognized everywhere through the United States" (p. 642).

The Court then adds in applying the rule to the case in hand:

"As the judgment was valid, the Court committed error in allowing the defendant to go behind it and contest matters which were conclusively settled by the judgment against the corporation" (p. 643).

A case very much in point is that of

Dowell *vs.* Applegate, 152 U. S., 723.

The facts in that case were as follows: On January 5, 1883, there was pending in the Circuit Court of the United States for the District of Oregon, a suit in Equity brought by Dowell against Jesse Applegate, William H. H. Applegate, Daniel W. Applegate and others, praying that a conveyance of certain lands from Jesse to William and Daniel be set aside as fraudulent and the land sold. A decree was entered accordingly. The land was sold under said decree on April 26, 1883, and Dowell became the purchaser. The sale was confirmed and on December 6, 1883, the master made a deed to Dowell.

Three years later Daniel Applegate, claiming under a deed made to him by William Applegate in 1874, brought a suit in the State Court against Dowell to obtain a decree removing the cloud upon his alleged title created by the master's deed of December 6, 1883.

Dowell naturally answered, setting up his title under the decree of April 26, 1883, and the sale had thereunder.

The State Court found in favor of Applegate, and Dowell came to this Court by writ of error.

This Court, after narrating the facts at considerable length, state the questions to be determined as follows (p. 335):

"From this history of the litigation between the parties, it appears that Dowell, in his answer in this suit, asserted his right to the forty acres in dispute under and by virtue of the decree and proceedings in the Circuit Court of the United States. That right having been denied by the judgment of the Supreme Court of Oregon, affirming the judgment of the Circuit Court of Douglas County, it is necessary to inquire:

First.—Whether the decree and proceedings in the Federal Court were, as claimed, void for the want of jurisdiction to hear and determine the suit which was instituted by Dowell in the Circuit Court of Douglas County, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon.

Secondly.—Whether if such decree and proceedings were not void, the State Court gave due effect to them, when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States "

After stating its reasons the Court announced its conclusions as follows:

" For the reasons given we are unable to concur in the views expressed by the State Court as to the effect to be given to the decree of the Federal Court. We are of opinion that due legal effect is not accorded to it, unless it be adjudged, as this Court does now adjudge, that never having been modified and being in full force and unreversed when the present suit was instituted, that decree conclusively establishes, as between Dowell and Daniel W. Applegate, that the former was entitled to have the lands now in dispute sold for his demands; and consequently, that the title acquired by Dowell, under that decree, cannot be here questioned by Applegate."

By reference to the printed record of above case (No. 209 of October Term, 1893, Record case No. 14196), it will be observed that nowhere in the answer of Dowell is there one word which in terms sets up any right or

title under the Constitution or laws of the United States, but as in the case of the plaintiff in error in the case at bar he pleads facts from which such right and title must inevitably flow.

SECOND POINT.

Under the Law of Tennessee the decrees of sale made by the Chancery and United States Circuit Courts had the effect of vesting in West J. Crawford, the purchaser at the sale of June 16 1894, a good title to the accounts which neither the Receiver nor Beckwith could thereafter question, and the Supreme Court of New York erred in refusing to give such effect to these decrees.

It is the settled practice in the Chancery Court of Tennessee to sell in advance of the final hearing property in the hands of a Receiver where same is depreciating in value.

Such was the case in Gleaves *v.* Ferguson, 2 Shannon (Tenn.), Cases, 560.

The case is stated in the syllabus as follows:

"Real estate in the hands of a Receiver *pendente lite* deteriorating and depreciating in value, requiring funds to insure and guard it, and no one being obliged to advance such funds, and which must ultimately be sold, may be sold before final hearing."

This was the precise condition of the newspaper plant which was sold on June 16, 1894, as set forth in the complaint herein.

It is the settled law of Tennessee that at a judicial sale made under a decree of the Chancery Court an innocent purchaser obtains a good title to the property sold even though the decree of sale is afterwards reversed. This proposition is laid down in

Anderson *v.* Ammonett, 9 Lea, 1, 11,

where the Court say, speaking through COOPER, J.:

"The weight of authority undoubtedly is that a decree for the sale of an infant's land in a case in which he is a party, and over which the Court has jurisdiction, is so far binding on the infant that he cannot, either by a bill of review or by an original bill or other proceeding, impeach it to the prejudice of the rights and interests of a *bona fide* purchaser for value, and without notice of the error (citing cases). * * * Our Act of 1835, Chap. 20, Sec. 16, brought into the Code, Sec. 3186, which provides that the title of a purchaser under a judgment or decree executed before writ of error obtained and supersedeas granted, shall not be disturbed by the subsequent reversal is an affirmance of the common law (Lewis *v.* Baker, 1 Head, 385; Freeman on Judgments, Sec. 484). The reason is that innocent third persons cannot be expected to look outside of the proceedings of courts of general jurisdiction, and have a right to assume that their judgments and decrees, in all cases in which they have jurisdiction of the parties and the subject-matter are regular and valid."

The above case was followed in

Greenlaw *v.* Greenlaw, 16 Lea, 435, 441,

where the Court say, per COOPER, J.:

"The title of a purchaser under an executed decree cannot be affected by any subsequent proceedings resorted to by the parties for the correction of supposed errors."

And in the recent case of Blanz *vs.* Bain, 95 Tenn., 87, 91, the Supreme Court of Tennessee, speaking of the Chancery Court, say:

"The Court being a court of general jurisdiction and having jurisdiction of the parties and the subject-matter, the purchaser, Campodonnico, being a stranger to the record had a right to assume that the decrees in the cause were regular and valid (Anderson *v.* Ammonett, 9 Lea, 1, 11), and his title cannot be affected by objections made for the first time after he had purchased and paid in the purchase money (Greenlaw *v.* Greenlaw, 16 Lea, 435)."

It is respectfully submitted that the judgment of the Supreme Court of New York, entered June 21, 1901, should be reversed with the costs of this Court and of the New York Court of Appeals, and that the judgments of the Supreme Court of New York, in favor of the plaintiff, one for $5,665.14, entered March 24, 1899, and the other for $103.90, entered July 10, 1899, should be severally affirmed.

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Office Supreme Court U.S.
FILED
OCT 14 1901
JAMES H. McKENNEY,
Clerk.

No. 369, 132

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Br. of Porter for D. C. (on mo.)

Filed Oct. 14, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 369.

To

Messrs. OTIS & PRESSINGER,
Counsel for Plaintiff in Error,
111 Broadway, New York.

Please take notice that on the third Monday in October, 1901, at the opening of this Court on that day, or as soon thereafter as counsel can be heard, the motions of which the annexed are copies will be submitted to the Supreme Court of the United States for the decision of that Court thereon.

Annexed hereto is a printed copy of the brief of argument to be submitted to the Court with said motions in support thereof.

Dated N. Y., Sept. 25, 1901.

ANTHONY B. PORTER,
Counsel for Defendant in Error
for purposes of the motion,
Tribune Building,
New York.

THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error, against SAMUEL C. BECKWITH, Defendant in Error.	*No. 369.*

And now comes the defendant in error and moves this Court to dismiss the writ of error therein for want of jurisdiction, because it does not appear from the record in this cause that there is any federal question involved in the controversy between the parties herein,

And the said defendant in error also moves this Court to affirm the judgment from which said writ of error was taken, because, although the record in this cause may show this Court has jurisdiction in the premises, yet it is manifest that the grounds assigned for said writ are frivolous, and that such writ was taken for delay.

Dated N. Y., Sept. 25, 1901.

ANTHONY B. PORTER,
Counsel for Defendant in Error,
for purposes of these motions,
Tribune Building,
New York.

IN THE SUPREME COURT OF THE UNITED STATES.

COMMERCIAL PUBLISHING COMPANY, Plaintiff in Error, against SAMUEL C. BECKWITH, Defendant in Error.	No. 369. Oct. Term, 1901.

BRIEF OF ARGUMENT.

MOTIONS TO DISMISS AND AFFIRM.

History of Cause.

This action was commenced in the Supreme Court of the State of New York, the complaint therein alleging *the collection and appropriation by defendant of a sum of money belonging to plaintiff and asking judgment therefor.*

Record, p. 2, etc.

Defendant for an answer to the complaint, *justified his collecting and appropriating such money under the provisions of an agreement in writing, which gave him authority therefor, and a lien upon such collections, for the purpose of applying the same in liquidation of a loan, and denying plaintiff's right to such monies.*

Record, p. 6 etc.

In January, 1891, the defendant in error, being a resident of New York, loaned to the Memphis Appeal Company, a printing and publishing stock corporation under the laws of Tennessee, at Memphis, in that State, the sum of $30,000, in consid-

eration of which, and as a part of the transaction that company constituted and appointed the defendant its Eastern agent with offices at New York and Chicago, and at the same time and for the purpose of securing to defendant, the payment of the said loan, with interest, and as evidence of said loan and appointment, the parties entered into an agreement in writing which will hereafter be referred to as the loan agreement.

Record, pp. 11 & 12, fols. 20–21.

Up to about September 30th, 1893, only the sum of about $10,000 had been received by defendant on account of said loan, there being an unpaid balance thereof due to him on that day of at least $20,000, *no part of which has ever been received by defendant, except as above stated.*

Record, p. 13, fol. 22

On or about this date the company, without the consent, knowledge or approval of the defendant, and undoubtedly for the purpose of defrauding the defendant, and preventing him from collecting the said unpaid balance of said loan, made and delivered a so-called trust deed of conveyance of the newspaper plant to Gwynne & Morgan, two of its creditors, for the purpose of securing them and other preferred creditors under said deed for the satisfaction of their several claims against the company, and said trustees thereupon took possession of said plant accordingly.

The trustees within a short time instituted a suit in the Chancery Court of Tennesee for the purpose of enforcing said deed and therein petitioned for the appointment of a Receiver, and said Court, thereupon appointed Wm. G. Chase of

Memphis, a Receiver, *pendente lite*, accordingly who immediately took possession of said trust property and undertook to carry on the publication of the newspaper, the Memphis Appeal-Avalanche, then being published by said company.

Record, p. 13, fols. 5–6 and p. 16, etc.

Soon after the appointment of the receiver, various actions in the nature of creditors' suits, three in number, were brought by creditors in the said Court.

Record, p. 14, fols. 24, Sec. 11.

The defendant was not named in said trust deed as a party in interest nor was his unpaid balance of said loan, or any part thereof secured or provided for thereby.

Record, p. 16, etc.

The defendant was not named in any of the said creditors' suits as a party thereto, nor was brought into the same by any process, nor did he ever appear as a party or otherwise in either thereof.

Thereafter the said trust deed suit and the said three creditors' suits were consolidated by a proceeding in said Court, but defendant was never made a party to said proceeding or appeared therein.

Record, p. 14, Sec. 11.

Thereafter the said trust deed was declared and adjudged by the United States Court of Tennessee as invalid and void, and as a consequence the said suit to enforce the same abated and ceased to exist, *and had so abated at the time of the making of the decrees hereinafter mentioned.*

Record, p. 37, Sec. 3.

The Receiver having failed to carry on the pub-

lication of said newspaper, the Chancery Court appointed by its decrees commissioners for the sale of the company's property, as an insolvent corporation, and under said decrees said commissioners sold said property, *and also all the right, title and interest of the Receiver of, in and to the accounts, the subject matter of this action*, to one West J. Crawford for the gross sum of $65,200, who in turn assigned his purchase to the plaintiff in this suit.

Record, pp. 14, 15, Secs. 12, 13.

In the meantime, and before the said consolidation, the said defendant had been made a party to said trust deed suit, *but for what purpose or upon what ground does not appear*, and he thereupon caused the same so far as he was concerned to be removed to the United States Circuit Court in Tennessee *on the ground of his non-residence in that State*, and he thereby *ceased to be within the Jurisdiction of the Chancery Court in and about that suit or any proceedings connected therewith.*

Record, p. 14, Sec. 10.

It appears incidentally and from matters extraneous to the agreed statement of facts on which this suit was tried that defendant had at some time obtained a judgment against the company, and that a suit was pending in favor of Foley-Williams Co., against the Memphis Appeal Co., and that there was a fund of some kind in the hands of some Court, and that the defendant had moved to have a levy of an execution on his judgment made a lien on said fund and that the Court had denied the motion, *but what that judgment was for—What said Foley-Williams Co. suit was for, or, what said fund in Court was, it nowhere appears* on the record and *as it must be manifest that neither of these con-*

ditions were connected with the said trust deed suit or the creditor's suit, it may be regarded as immaterial to further consider the same, and particularly so as the said Foley-Williams suit was not one of the three creditors suits included in the consolidation proceedings, *and that the money collected by defendant for which this suit was brought, was never in the hands of the Court, nor in the State of Tennessee, but was always in the hands of defendant and appropriated to liquidate the loan account and that he never had any occasion to obtain a judgment therefor.*

Record, p. 35, fol. 61, etc.

At the time of the making of the trust deed, the company had in its possession certain advertising-matter *furnished it by the defendant under said loan agreement,* and which had not as yet been published, in the newspaper printed and circulated by the company, and immediately upon the receiver taking possession of the trust property under the deed, a controversy arose between him and defendant concerning same, *in which the receiver took the ground that he had the right to publish same in the company newspaper to be continued by him and collect the charges therefor, and the defendant contending that if the receiver published the same, he, defendant was entitled under the terms of the loan agreement to collect the charges therefor and apply same to extent of $1000 monthly upon the account of said loan, but no controversy regarding such matter was ever brought into Court nor was such dispute ever the subject of judicial consideration in any of the various suits in the state or United States Courts in the State of Tennessee.*

Record, p. 13, secs. 4, 23.

While the receiver was conducting the publication of said newspaper under the trust deed—he published the said advertising matter in the newspaper as continued by him, and endeavored to collect the charges therefor, but was unsuccessful in the attempt, the defendant having collected and applied the same to the liquidation of the loan account *under his authority and privilege contained in said loan agreement.*

Record, p. 13, secs. 8, 24.

The sales commissioners sold the newspaper property generally under the sales decree of the Chancery Court, *and it appears from the record that only the right, title and interest of the receiver therein in the disputed accounts in this suit was sold by said commissioners.*

Record, p. 15, sec. 13.

Prior to the commencement of this action the plaintiff demanded of the defendant the various amounts collected by him under the loan agreement for charges of the publication of said advertising matter by the receiver, and on defendants refusal, instituted this suit to recover the same, which was then estimated to be about $4,000.

Record, p. 14, sec. 9.

The case came on for trial upon an agreed statement of facts in writing before his Hon. Mr. Justice Beach, at New York (Record, p. 11, etc.), resulting in a denial of plaintiff's motion for judgment and an order that the exceptions be heard in the first instance at Appellate Division, which duly coming on to be heard, resulted in sustaining said exceptions and ordering a new trial.

The new trial resulted, as a matter of course, in a judgment for plaintiff—as also did defend-

ant's appeal therefrom to the Appellate Division, and an appeal was thereupon taken by defendant to the Court of Appeals, where said judgment was reversed, from which action of that Court the writ of error herein was taken by the plaintiff.

Record, p. 45, fol. 80, etc.

The defendant maintains that *neither the pleadings in the suit as instituted in the N. Y. Supreme Court, or the facts as agreed to in writing by the parties thereto for the trial of the cause, set up or presented any federal question for the consideration of the Court thereon*—nor is there any evidence by the record that any such question was an issue on said trial, *the only question to be determined thereon under the pleadings being the construction and scope of the written agreement between the defendant and the company under which said loan and appointment was made, and if or not defendant was justified thereunder in his said collections by virtue thereof.*

POINT I.

If there be any federal question shown by the record it must arise within Sec. 709, U. S. R. S., and appear on the face thereof so clearly and plainly that no argument is necessary to discover the same.

The contention of the plaintiff in error is based upon an alleged disregard by the Court of Appeals of the State of New York, of alleged prior adjudications by the Courts in Tennessee upon the questions involved in this suit, by its direction to the Supreme Court of New York to enter a judg-

ment adverse to the plaintiff, as a result of its reversal of the decisions of the Courts from which an appeal was taken to it by the defendant.

To sustain this contention the plaintiff makes certain assignments of alleged error to this Court, to the effect that the decision of such appeal to the New York Court of Appeals violated the provisions of the Constitution of the United States, but fails to indicate what portion thereof was so violated.

Record, p. 51, fol. 91, etc.

To successfully maintain the plaintiff's said theory upon which the writ of error herein was taken it must appear by the record that the federal question involved therein must have been set up in the pleadings upon which the trial was had in the lower Court, and such question must plainly appear upon the face of such record as having been so set up in such pleadings, *and so plainly and clearly set up as to require no argument on plaintiff's part to demonstrate its presence to this Court.*

Does this condition of the case present itself on the record before this Court?

The answer to this proposition should be a negative one, as will appear, not only from a reading of the record, but from the labored statement and assignments of error by the plaintiff on his application for this writ, which is supplemented by an exhaustive brief of an argument on his part in its support, for the purposes of resisting these motions.

Spies v. Illinois, 123 U. S., 131.

POINT II.

It does not appear by the record that a sufficient federal question was set up by the pleadings, or was necessarily involved in the complained of action by the N. Y. Court of Appeals, and for this reason the writ of error should be dismissed for want of jurisdiction in this Court, and the judgment of the lower Court affirmed for the frivolousness of the grounds upon which the writ was taken.

To sustain a writ of error, *it must appear by the record*, that some, or all of the conditions contained in Sec. 709, U. S. R. S., are present and that the Court complained of in and by the assignments of alleged error has violated or disregarded the same, or some thereof, and that such action was inconsistent with the law and practice in such cases.

To give the Supreme Court jurisdiction on a writ of error from a State Court *the record must show* that a certain provision of the Constitution, an act of Congress, or a treaty between this and another country was relied upon by the party thus bringing the writ, and that the right thus claimed was denied, *not merely that the question might have arisen or would have been applicable, but that it actually arose and was necessarily involved in the decision complained of.*

The record must show on its face,

1st. That a federal question was set up by the pleadings.

2d. That the decision of the lower Court was adverse.

3d. That the decision was by the highest Court in the State.

4th. That such decision necessarily *involved a disregard of such federal question.*

These requirements are not satisfied by the record in this case.

There are three claimed errors assigned by the plaintiff as the grounds for the taking of the writ, two of which rest upon an alleged disregard by the New York Court of Appeals of certain decrees of the Court of Chancery of the State of Tennessee.

Record, p. 51, etc., fol. 91, etc.

To sustain these three assignments of error, or any one of them, it must appear on the record that the Courts in Tennessee had judicially considered and adjudicated the matters in dispute between the Receiver and the defendant concerning the publication of the advertising matter in question and the rights of parties to collect the charges for the same, and to have fixed and determined the right, title and interest of each party to the controversy therein to such collections, but it does not so appear, and the fact that such Courts may have assumed to direct the disposition of the accounts does not constitute such an adjudication.

Two of the decrees of the dates mentioned in the said assignments of error appear on the record, each being of the Chancery Court of Tennessee, *but the decree mentioned in the first assignment of error as having been made by the U. S. Circuit Court in Tennessee does not appear on the record.*

The reasons and ground for the action of the New York Court of Appeals assigned as the said three grounds of error does not appear in the record in this Court aside from the *remittitur* upon which the complained of action of the N. Y.

Supreme Court was founded, *but such reasons and grounds appear in the opinion of the Court on the decision of said appeal from the judgment of the Appellate Division*, and officially published pursuant to the laws of that State, the opinion therein being supported by the full bench, is for the convenience and information of this Court for the purpose of these motions, set out as follows:

COMMERCIAL PUB. CO.,
Respondent,

against

SAMUEL C. BECKWITH,
Appellant.

N. Y. Rep., 167, page 329, etc.

HAIGHT, J.—The plaintiff as the assignee of the purchaser at a judicial sale, brings this action to recover moneys claimed to have been due and owing the receiver by the defendant.

The facts were agreed upon and so far as they are material are as follows: On the 3d day of January, 1891, the defendant entered into a contract with the Memphis Appeal Company, a corporation engaged in publishing a newspaper at Memphis, in the State of Tennessee, of the name of *The Memphis Appeal Avalanche*. The contract consists of two letters written by the parties, bearing the same date which are as follows:

"MEMPHIS, Tenn., January 3, 1891.

"*S. C. Beckwith,*
48 Tribune Building,
New York City.

"DEAR SIR: In consideration of special efforts

which you pledge yourself to make in our behalf to the best of your efforts and ability, and furthermore, in consideration of allowing you nothing in the shape of salary, office rents or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1, 1891, and sooner if possible, on a plain commission basis of 25 per cent. on all business for all that portion of the United States north of a line running east and west with the southerly boundary of Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

"All applications for rates, space, &c., from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent or advertisers from your territory (which, however, is not contemplated), we will allow you the commission named upon same and refer it to you for collection.

"You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and in event of that you are simply to lose your commission, but not to be liable beyond that.

"You are not to represent any other morning paper in the State of Tennessee or Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the *Appeal Avalanche*.

"MEMPHIS APPEAL AVALANCHE COMPANY,
" T. B. HATCHETT,
"Bus. Manager.

"Accepted—S. C. BECKWITH."

"MEMPHIS, Tenn., January 3, 1891.

"*The Memphis Appeal Company, Memphis, Tenn.:*

"GENTLEMEN—In consideration of a contract this day entered into by and between us, I hereby agree to advance to you $30,000 as follows:

"5,000 in cash on or before January 7, $5,000 on or before the 12th of January, 1891, then $5,000 on the 26th of January, 1891, to take up your note

now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

"The amount named of $30,000 to be loaned you on the Appeal Company's notes, indorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your company, and which stock shall not be increased without my consent during the term of this loan; neither shall any incumbrance be placed upon the same.

"Said loan and interest at 6 per cent. to be paid me in monthly installments by moneys coming into my hands from the advertising in your paper, in amounts, say $1,000 per month, until paid.

S. C. BECKWITH.

"O. K. MEMPHIS APPEAL COMPANY, T. B. HATCHETT (Business Mang'r).

(Indorsed:) "As the debt is reduced I will surrender stock collateral *pro rata*.

"S. C. BECKWITH."

The contract, so far as appears, was performed to the mutual satisfaction of the parties until the 30th day of September, 1893, when the Memphis Appeal Company became insolvent and transferred by a deed of trust all its interest in the newspaper referred to, including the plant, good will subscription list, advertising patronage, &c., to Robert J. Morgan and Andrew D. Gwynne, as trustees for the benefit of creditors. On the same day the trustees brought an action against the Appeal Company, the defendant in this action, and others, to procure a judgment directing them to carry into effect the transfer to them as provided in the deed, and in that action one William J. Chase was appointed the receiver of all of the property transferred to the trustees, who was, by the order appointing him, authorized to continue the publication of the newspaper. The receiver so appointed entered upon the discharge of his duties as such and continued the publication of the paper until the 16th day of June, 1894, when the property of the company, which had been transferred by the trust deed to the trustees, was, under an

order of the court, sold to one Crawford for the sum of $65,200, and was by him transferred to the plaintiff in this action. It further appears that, at the time, the receiver was appointed, the defendant had procured orders for advertisements from a large number of individuals, which had not at that time been published in the paper. He thereupon after advising the receiver as to the provisions of the contract existing between him and the company, gave him notice in writing that the contract was in full force and that he should insist upon its full performance. The receiver replied, in writing, saying he should not recognize the contract; that while he considered it his duty to carry out the advertising contracts which were in the course of completion in the current publication of the paper, he should not recognize the defendant thereafter, and that on all business thereafter handled collections would be made by the receiver direct, instead of by the defendant. The defendant then replied refusing to admit the claims of the receiver. Thereafter, the receiver continued the publication of the newspaper and published therein the advertisements obtained by the defendant and delivered to the paper prior to the appointment of the receiver. The value of these advertisements amounted in the aggregate to $3,902.74, which sum the defendant collected from the persons from whom he had procured the advertisements and now refuses to pay the same over to the receiver or to the plaintiff in this action, claiming the right to hold and apply the money in satisfaction of his commissions and the loan made by him to the company under his contract of January 3, 1891, the amount of which, at that time remaining unpaid, exceeded the sum of $20,000.

After the facts had been submitted to the court the defendant moved for a dismissal of the complaint. This was refused, and he then moved for a direction of the verdict in his favor. This was also refused, and then, upon motion of the plaintiff, a verdict was directed in its favor for the full amount of his claim. Exceptions were taken by

the defendant to each of these rulings of the Court.

In determining these questions it becomes important to first ascertain the meaning and the effect of the contract entered into between the defendant and the Memphis Appeal Company. As we have seen, the two letters constituting the agreement bear the same date and were evidently intended to be read and considered together. So reading them they constitute one contract and not two independent agreements. In the first place, the defendant Beckwith appears to have loaned the Memphis Appeal Company the sum of $30,000, with interest at 6 per cent., to be paid in monthly installments out of moneys coming into his hands from advertisements published in the Memphis Appeal Company's paper in amounts of $1,000 per month until the loan was paid in full, and in consideration for this loan the Memphis Appeal Company agreed to appoint the defendant their agent for the period of five years to procure advertisements for their paper in a territory specifically designated. He to fix the rates, collect the bills, render monthly statements, and have for his compensation 25 per cent. commission. The clause of the agreement giving to the defendant the right to collect all of the bills was evidently intended to give him the control of the proceeds resulting from the advertisements, so that he could apply the same upon his loan to the amount of $1,000 per month; and this provision of the contract, we think, was in the nature of an equitable pledge of the receipts for that purpose. When the receiver of the corporation was appointed he took possession of the assets and business subject to the liens and obligations of the corporation. As receiver he could refuse to carry out or execute the contract of the defendant, and by so doing, leave him with his claim for damages for a breach of the contract; or, if he saw fit, he could carry out and perform the contract of the corporation and thus prevent any claim for damages. He could not, however, perform the contract and receive the benefits without satisfying the obligations of the company thereunder. When, there-

fore the receiver accepted and published the advertisements procured by the defendant, he must be deemed to have done so under the contract which the defendant had with the corporation, and under that contract the defendant had the right to collect the moneys accruing for such advertisements and to retain out of such collections a sum not to exceed $1,000 per month, to be applied upon the loan. All collections exceeding that amount belonged to the receiver. But inasmuch as the collections did not exceed that sum per month, there was nothing going to the receiver which was recoverable in this action.

It is said that the receiver, having published the advertisements and incurred the expenses incident thereto, had earned the amount which the advertiser agreed to pay, and that he therefore was entitled to all of the proceeds therefrom. The Appellate Division appears to have entertained this view, but this leaves out of consideration all of the rights which the defendant had acquired under his contract, and all the time and money expended by him in procuring the contracts for advertisements from all sections of the country covered by his agency. That Court was also of the opinion that Express Co. v. Railroad Co. (99 U. S., 191) was an authority in support of its position, but to our minds it has no application. In that case the express company had loaned the railroad company the sum of $20,000, and the railroad company had agreed to carry freight for the express company, applying the sums due for transportation upon the loan monthly. The railroad company passed into the hands of a receiver and the express company sought to compel a specific performance of the contract by the receiver. The bill was dismissed and we think properly. As we have already seen the receiver had a right to refuse to carry out or execute the contract of the corporation whose assets had come into his hands. But, as we have already shown, he cannot adopt and perform the contract and receive the benefits without also incurring the obligations. If the receiver of the railroad company had concluded that it was for the best interests of the estate to carry out the

contract with the express company, a very different question would have been presented. To the same effect is Central Trust Co. v. Marietta & N. G. R. R. (51 Fed. Rep., 15), also relied upon by the Appellate Division."

But one other question requires consideration here, and that is as to whether the rights of the defendant have been settled by previous litigation in this case.

As we have already shown, an action was brought by the trustees under the deed in trust to procure a judgment directing them to carry into effect the transfer to them, in which action a receiver was appointed. The defendant Beckwith was made a party to this action and he subsequently procured a removal of the action, so far as he was concerned, into the Circuit Court of the United States. Thereafter several general creditors brought actions against the Memphis Appeal Company for the purpose of winding it up as an insolvent corporation. Subsequently all of these actions were consolidated and proceeded to trial in the Chancery Court of Shelby County, Tennessee, which resulted in a decree, which was also entered as a decree in the Circuit Court of the United States. Under this decree it was adjudged that the levy of the execution in the case of Foley-Williams Manufacturing Company *et al.* created no lien upon the assets of the company, and the court, therefore, dismissed the cross bill of Samuel C. Beckwith. It further appeared in the decree that the prayer of Samuel C. Beckwith for leave to appeal from so much of the decree as adjudged that he had no lien upon the fund in court for the payment of his judgment against the Memphis Appeal Company was granted upon his executing a bond for costs in the sum of $1,000. The decree contained numerous adjudications as to the rights of other parties, but nothing further affecting the rights of the defendant. A review was had in the Supreme Court of Tennessee, in which the decree was in part reversed and modified, and, in other respects, affirmed. There was nothing, however, in the reversal or modification that appears to affect the defendant, Beckwith. None of the pleadings are

set forth in the record, so that we are left without information as to the precise issues raised and tried. We are not advised as to the interest Beckwith had in the execution levied by the Foley-Williams Manufacturing Company. It is quite apparent, however, that it had no connection with the matter involved in this litigation. We are not advised as to the character or the amount of the judgment which he sought to have established as a lien upon the fund in court. Possibly he had obtained a judgment against the Memphis Appeal Company for the amount of his loan and that he sought to have this paid out of the fund in the hands of the receiver, but this is merely a suggestion based upon the allowance of his appeal, and does not appear as a fact in anything that we have been able to discover in the record. We think, therefore, that the judgment of the Court of Chancery of the State of Tennessee does not affect the rights of the defendant in this action. It did not adjudicate nor attempt to determine his right to the moneys received by him for advertisements inserted in the paper by the receiver after his appointment. Under the judgment the purchaser became entitled to all the moneys due and owing to the receiver by reason of the publication of the paper, but moneys that did not belong to the receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question.

We think the judgment should be reversed, and, inasmuch as the facts are established by the written stipulations of the parties, final judgment should be ordered in favor of the defendant, dismissing the complaint, with costs in all Courts.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment reversed, &c.

From the reading of this opinion it is clear that *the Court of Appeals did not consider that there was any Federal question appearing on the record before it, which record is now before this Court*

for its action on these motions, and that its decision was upon a view of the case not inconsistent with such record and within the scope of the pleadings therein.

If the Federal question said by plaintiff in error to have been duly set up in this cause be present it should appear by the record.

1st. The bill of complaint in this action upon which this suit was instituted should contain a plain and clear statement of such question, and so pleaded that there could be no doubt that it was the intention of the pleader to set up and raise such Federal question as a bar to defendant's right to defend therein as against an adjudication thereof by the Courts of another State.

Record, p. 2, etc.

The mere recitation in such a pleading that certain legal proceedings occurred in another State is not sufficient, for if there existed a Federal question at the time of the institution of this suit in New York by way of a former adjudication in another Court upon establishing the cause of action upon which this suit was founded and which was claimed to be binding on defendant, *it should have been so pleaded and the recovery therein sought on such grounds and not left open to a conflict upon generic grounds.*

It will be here observed that the complaint in this action—although reciting matter clearly, extraneous and immaterial to the cause of action therein set up—is for the recovery of money *claimed by the plaintiff to belong to him, as an original proposition, and is not sought to be recovered for on the ground that the ownership and title thereto was in*

the plaintiff by reason of an adjudication in litigation theretofore existing in another Court in which such title and ownership had been the subject of consideration and decision by such tribunal, and that thereby the plaintiff was entitled to recover in this suit.

It needs but a reading of the complaint in this action to see at once that no such federal question was set up therein or relied upon as the ground of the asked for recovery, but that such recovery was demanded for the reason that plaintiff was entitled to the same upon generic grounds *and not by right of a former adjudication in another Court establishing a right to recover: and a reading of the answer to the complaint makes it clear that the issue formed by the pleadings, was whether or not defendant had a lien and the right to the money under and for the purpose of the loan agreement.*

Record, p. 6, etc., 2d.

The agreed statement of facts upon which this suit was tried, should have so clearly and plainly set forth such federal question as to leave no doubt as to its meaning and purposes, that there had been a *former adjudication* of the questions at issue in this suit, *and that the rights of the Receiver, the defendant and others claimed under the trust deed the loan agreement, or otherwise had been thereby settled and adjudicated, but there is no such fact in such statement, and it is not to be presumed that any other fact than as appearing in such statement was before the Trial Court, and the recitation in the complaint and statement of facts* of the various transactions which took place relating to the troubles of the Memphis Appeal Co., in Tennessee, *are but the history thereof and cannot be deemed or con-*

sidered as setting up any federal question upon which the plaintiff now claims to have relied for a recovery in that suit.

3d. The bill of complaint in the so-called trust deed suit instituted by the trustees thereof named therein and in which the Receiver, *pendente lite*, was appointed, *should appear on the record*, as having been a part of the facts and testimony used on the trial and appeals in this action, in that such Courts, and this Court, may have seen if such alleged federal question was therein involved, *and that the questions involving the Trustees and Defendant's rights under the agreement upon which he stands in this suit were made an issue for adjudication but it does not appear on the record.*

4th. The bills of complaint in the three so-called Creditors suits in the Tennessee Courts *should also appear by the record*, for the same purpose as assigned in the foregoing proposition, *but it does not appear on the record.*

5th. The petition for the so-called consolidation of said trust deed suit and the three creditors suits *should appear by the record*, in that this court might ascertain if such federal question was therein or thereby presented *but it does not appear on the record.*

6th. The Receiver was one appointed in a suit at the instance of parties claiming a preference over other creditors, *and was not a receiver appointed in insolvency proceedings against the Company*, nor for the purpose of winding up the Company as an insolvent; *nor did he as a fact wind up and settle the affairs of the Company*, but he *was but a receiver, pendente lite only, and had no title to any property of the Company except such title as the trustees had, and it was such title to the monies in question, in the light of defendant's*

rights thereto under the loan agreement, which was the issue set up by the pleadings and which was decided by the Court of Appeals, to be subordinate to that of the defendant thereunder.

Com. v. Beckwith, 167 N. Y. 329.

None of these papers ~~or facts~~ appear by the record, and to supply the omission and to bring his contention to the mind of this Court, the plaintiff enters upon a prolonged and exhaustive argument with the hope of converting this Court to the belief that he raised and set up a federal question in his pleadings for the trial in the Courts of New York, and that such question is somewhere hidden or involved in the historical and immaterial matter constituting the bulk of his complaint.

But plaintiff in Error contends that the federal question involved and set up is found in the ~~last~~ *decrees of the Chancery Court of Tennessee, the disregard of which is herein stated as the assigned grounds of error.*

Record, pp. 27, 29 and p. 15, Sec. 13, at close.

It is true that by the language of those decrees that Court *undertook to direct the disposition* of certain property by a public sale at auction, and to give a title thereof to a purchaser thereon, free and clear of all claims on the part of third persons, *but the record does not show that the Defendant was bound by such decrees, or that they in any way adjudicated upon his interest therein*, and it cannot be said with propriety or good judgment that a direction to do a certain act is, *in itself*, a judicial adjudication upon the general and private rights of individuals concerning such act, *unless it appears by some other judicial statement made in*

connection therewith, or otherwise that such an adjudication had then and there or prior thereto been made, and that such act was the result thereof.

As one will scan the record in vain for any evidence that the loan agreement or the defendant's rights thereunder in the property so directed to be sold were ever the subject of consideration or adjudication by the Chancery Court, how then can it be said that such decrees could divest him of such rights?

Such is not the law.

The decrees appear to have been ex parte papers, as they do not recite the appearance of counsel on their making, and it is preposterous to argue that such a paper can be set up and quoted as an adjudication of disputed rights between *people who have not been heard on the application or granting of such paper.*

If the Receiver had desired an adjudication as between himself and the defendant concerning the subject matter of the controversy between them regarding the publication of the disputed advertising matter, *the Court was open to him for such purpose, but he did not see fit to resort to such a relief, but made a law unto himself and published such matter in the face of defendant's contention* and so took all the chances of trouble of which the present suit is the sequel.

It would appear by the record that a peculiar and unusual practice exists in the Chancery Court of Tennessee, but it is somewhat surprising that the Court was made to say in said decrees, such *a misleading statement to possible purchasers on the directed sale,* as that which guar-

anteed a good and free title thereon to property, *the rights of other people thereto not having been finally adjudicated and settled—and it is a wild theory to advance, and is one which will be impossible to maintain, that the Court by a decree like those relied upon can confer a title by proclamation or otherwise, when such title is not its, or in its power to grant.*

But the disputed accounts in question in this suit were not sold under the said decrees, it was only the right title and interest of the Receiver therein that was sold.

Record, p. 15, Sec. 13.

By an examination of the thirteenth of the agreed statement of admitted facts in this suit it will be seen that it *was only the right title and interest of Receiver Chase of, in and to the claims in dispute in this suit which was sold by the Commissioners under said decrees, and from this it appears that not the accounts themselves, but only the right title and interest of the Receiver therein was sold by such Commissioners*

Record, p. 15, Sec. 13.

It is true the language of the decrees may be said to direct the Commissioners to sell all the corporate property irrespective of its possessor or character, *but the Court must look to what was done under the decrees*, and *not as* to what *the decrees may have contemplated*, and *in doing this the 13th fact in the statement as agreed* upon for *the trial dominates and determines that question.*

Record, p. 15, Sec. 13.

Did the Court of Appeals disregard such decrees, or has it in any way interferred with the sale made under them or authorized thereby?

Answering this proposition the defendant in error contends that such purchaser *obtained only a colorable title to the accounts, and that it was only the Receiver's right, title and interest of, in and to the same which constituted the actual purchase, that such accounts could only have been sold subject to the lien and rights of the Defendant therein, and that the exercise of such rights and the enforcement of such lien by the Defendant left the purchaser with but the semblance of a claim with no substance to be satisfied or realized upon by him or his assignee thereof–and that the Court of Appeals did not by its decision divest or interfere with the title or rights conferred by such sale and purchase.*

AS IT WAS ONLY THE RIGHT TITLE AND INTEREST OF THE RECEIVER IN THE DISPUTED ACCOUNTS WHICH WAS SOLD TO CRAWFORD IT MUST BE CONCEEDED THAT WAS ALL HE PURCHASED AND AS SUCH INTEREST WAS SECONDARY TO THE DEFENDANT UNDER THE LOAN AGREEMENT THERE WAS NO SUBSTANCE LEFT FOR THE PURCHASER.

The record does not set forth any list or Schedule of property or accounts sold under the decrees hence it cannot be said that the accounts irrespective of the Receiver's right, title and interest therein was sold thereunder, and it must be conceeded that the said 13th fact of said agreed statement is the only thing on the record which covers that question, and that it was only such interest as the Receiver had in the disputed accounts which was sold to plaintiff's assignor, and it does not appear on the face of the record that any court in Tennessee had ever considered or determined in any way the right title and interest of the receiver in the disputed accounts or that such a question was ever before them for

its consideration or that defendant's rights under that agreement were ever considered by such courts—

This position being established it is clear that the Court of Appeals was not in error in directing the Supreme Court as complained of, for there is nothing on the record showing that the accounts were sold in any other way except the right, title and interest of the Receiver therein, and it became the duty of that Court of Appeals upon its consideration of the appeal, to ascertain what such right, title and interest of the Receiver in such accounts was, as the record does not show that the Tenn. Courts had done so, and to decide if or not the defendant by his action had deprived the purchaser thereof, and this is all that such Court did in its reversal of the judgment of the Court below, *for the Court of Appeals decision on this subject goes only to the extent of holding that under the loan agreement the defendant had a right to collect all bills for advertising arising under that agreement, and appropriate and apply the same in liquidation of said $30,000 loan the sum of $1,000 per month, and that it was the excess thereon in such accounts which belonged to the Receiver and that the defendant had a lien by virtue of such agreement upon the collection proceeds to satisfy at least $1,000 per month for such purpose, and that his action set forth in the complaint was justifiable for such reason,* or in other words, *that the right, title and interest of the Receiver in the accounts sold to Crawford was only the excess (if any) of such collections by the defendant which might exist after the application by him of $1,000 per month therefor to reduce the loan account, and as the sums collected by defendant did not exceed that amount in that the entire sum collected was not sufficient to make up*

the $1,000 per month for the time covered in their collection, but absorb the entire amount collected, there was no excess to which the right, title and interest of the receiver could attach, and that he had but a colorable interest in such accounts to be sold, and consequently Crawford as the purchaser acquired no greater or other interest on the sale than the receiver himself had in such accounts, which must be concluded as amounting to nothing, and that such sale was subject to the rights of defendant under that agreement.

Com. v. Beckwith, 167 N. Y., 329 (Opinion).

Hence it is, that *the Court of Appeals has not in any way interfered with or disregarded either of the decrees of the Tennessee Court or U. S. Court touching this matter, but decided the appeal on a ground entirely independent from one involving a federal question and strictly within the 13th admitted fact in this cause*, and in doing so it has but decided what the right, title and interest of the receiver was in said accounts, which had not been done by the Courts in Tennessee, *and has not sought to or in any way passed upon or disregarded the validity or legality of the said decrees under which such interest was sold, nor made any decision in disregard thereof or as to the validity of the sale, and for all that the record shows, the Court of Appeals must be regarded as acquiescing in such decrees in all respects, so far as it was in its power or province to do.*

To conclude the consideration of the question presented by this point it may be said with confidence that no federal question appears by the record, *but if there be a colorable one appearing thereby*, that the case comes *within the practice long since established in this Court, "that if a decision*

"of a federal question, fairly presented by the "record, is rendered unnecessary by the view "which the Court properly takes of the rest of the "case within the scope of the pleadings, the judg- "ment is not open to review in the Supreme "Court."

If there be a federal question of some kind fairly presented by the record in this cause, and a *decision thereon by the Court is unnecessary by the view it takes of the rest of the case within the scope of the pleadings, the judgment cannot be review'd, the writ should be dismissed and the judgment affirmed for the frivolousness of the grounds upon which it was taken, and for delay.*

Spies v. Ilinois, 123 U. S., 13'.
Chapman v. Goodnow, 123 U. S., 540.
Brooks v. Missouri, 124 U. S., 394.
Philipps v. Association, 124 U. S., 605.
French v. Hopkins, 124 U. S., 524.
Cited and followed in, 181 U. S., 49.

THE PRACTICE OF THIS COURT IN CASES OF THE KIND AT BAR HAS BEEN FULLY AND EXAAUSTIVELY SET FORTH IN A RECENT DECISION, FROM WHICH WE BEG THE PRIVILEGE TO QUOTE.

"With respect to writs of error from this Court "to judgments of State Courts in actions between "purchasers under judicial proceedings in the "Federal Courts and parties making adverse "claims to the property sold, the true rule is this: "That the writ will lie, if the validity or con- "struction of the judgment of the Federal Courts "(or State Court) or the regularity of proceedings "under it are assailed; but if it be admitted that "the judgment (decrees) was valid and such pro- "ceedings (the sale) were regular and that the pur- "chaser took the title of the defendant (The Mem- "phis Appeal Co. insolvent, as represented by the "Receiver) and the issue relates to the title

"to the property sold, as between such defendant "or the purchaser, and the third party making "the adverse claim (defendant in error) no Federal "question is presented."

Avery v. Popper, 179 U. S., 305, decided Dec. 3, 1900.

In the case at bar the record does not show that the validity or the construction of the decrees of the Chancery Court, or as entered in the Circuit Court of the U. S. for Tennessee, nor the regularity of the sales proceedings thereunder are assailed, *but on the contrary, it clearly appears by the record that such decrees and sale are unassailed and admitted* (Record, pp. 14 & 15, Secs. 12 & 13), and that the only question at issue in the suit was as to the *merits of the adverse claim set up by the defendant in error, to the property alleged to have been sold under the decrees*, and which were supported by the N. Y. Court of Appeals in and by its action complained of under this writ.

As the case at bar, and the one last cited seem to be analogous and similar in all material respects, it is submitted that the writ herein should be dismissed under the rule laid down in that decision.

Conclusion.

It is therefore submitted that the record before this Court does not show with due certainty that the Courts in Tennessee ever adjudicated the rights of defendant under the loan agreement, or any dispute between him and the Receiver concerning the accounts in question in this suit, or that the Court of Appeals decided adversely to a standing controlling decision, decree or judgment of the Court of another State establishing the

questions presented by said record and brought up by this writ, and that there is no sufficient federal question presented by said record for the consideration of this Court, and that the writ of error should therefore be here dismissed for want of jurisdiction, in this Court to review the judgment complained of, and that such judgment be affirmed by this Court because of the frivolousness of the grounds for said writ, and for that said writ was for the purpose of delay; and that the defendant in error have his costs and disbursements of these motions, and interest at six per centum upon his judgment, together with ten per centum additional thereto on said judgment as damages for his delay upon proceedings on said judgment by reason of said writ, and that the mandate of this to the lower Court be made accordingly.

All of which is respectfully submitted.

Dated New York, Sep. 25, 1901.

ANTHONY B. PORTER,
Counsel for Defendant-in-Error,
70 Tribune Building,
New York.

No. 152.

Supreme Court of the United States.

Brief of Porter for D. C.

Filed Dec. 4, 1902.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 152.
October Term,
1902.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

ANTHONY B. PORTER,
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Tribune Building,
New York City.

ANTHONY B. PORTER,
Of Counsel.

APPEAL PRINTING CO., 1416 VESEY STREET,
Telephone 1511 Cortlandt.
1902.

IN THE

APPEAL PRINTING CO., 24-26 Vesey Street N. Y.

IN THE

Supreme Court of the United States.

WRIT OF ERROR FROM NEW YORK.

COMMERCIAL PUBLISHING COMPANY,
Plaintiff in Error,

against

SAMUEL C. BECKWITH,
Defendant in Error.

No. 132.
October Term,
1902.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

Statement of Case.

This action was instituted in the New York Supreme Court to recover from the defendant the sum of $3.902.74 for money had and received, the plaintiff recovering judgment accordingly; on appeal being taken to the Appellate Division of that Court the judgment was affirmed, and subsequently reversed by the Court of Appeals, a writ of error at the instance of the plaintiff brings the matter into this Court for review upon the record.

The writ proceeds upon the alleged grounds that the Court of Appeals disregarded the decrees of Courts in Tennessee and that such disregard was in conflict with the constitutional rights of the plaintiff set up by the pleadings.

A motion was duly made to this Court on the Record at the October term, 1901, to dismiss the writ for want of jurisdiction and to affirm the judgment, which motion was postponed by the Court to be heard with the arguments on the merits.

The plaintiff contended in the Trial Court that the money sued for had been collected and retained by the defendant wrongfully and unlawfully, in that the agency agreement between him and the Memphis Appeal Company under which the defendant claims to have acted did not justify such collection and retention.

Record, p. 2, Complaint.

The defendant justified his action as being proper and lawful under that agreement.

Record, p. 6, Answer.

For the purpose of the trial in the lower court, it was duly stipulated that the same should be had upon an agreed statement of facts and such trial was had accordingly.

Record, pp. 11-15 inclusive.

To the said statement of facts copies of certain documents were annexed as Exhibits in verification of such facts, but there was no stipulation that matter found in such Exhibits which raised any questions other than specifically set out in

said statement should be taken as additional facts for submission, or consideration at the trial.

Record, p. 11, fol. 19.

Upon the trial of the action in the Supreme Court upon the facts as so stipulated the exceptions of the plaintiff were sustained and affirmed by the Appellate Division of that Court and thereupon an appeal was taken to the Court of Appeals.

The Court of Appeals reversed the Appellate Division, thereby sustaining the answer to the complaint that the agency agreement gave the defendant a lien upon the accounts in question and the privilege of collecting the same, and appropriating the proceeds towards the liquidation of the balance due on the loan to the company, and that the receiver's interest in such accounts were subordinate to that of the defendant, and that there was nothing on the record showing that the defendant's rights under the agreement had been adjudicated by the Court in Tennessee.

Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

POINT I.

No federal question arises upon the construction by the Court of Appeals of the agreement of January 3rd, 1891, as to the rights of the defendant thereunder and the same is not reviewable under the writ herein.

Such construction is a State question, not a Federal question.

On January 3rd, 1891, the defendant and the Memphis Appeal Company, entered into an agency agreement evidenced by paper writings executed by the respective parties under that date, (which are to be read together and constitute one agreement) and this agreement was mutually performed up to about September 20th, 1893, at which date, the company executed and delivered a deed of trust of its newspaper property to Gwynne and Morgan as trustees for the purposes therein mentioned.

Record, p. 11, etc., fols. 20-21.
Record, pp. 16-21 inclusive.

Upon the delivery of this deed the Trustees took possession of the property therein mentioned, and the publication of the newspaper, the Memphis Appeal Avalanche, which theretofore had been published and circulated by said Company, was continued by a receiver appointed *pendente lite*, by the Chancery Court of Tennessee in a suit therein pending to enforce the terms of said deed.

Record, p. 13, fol. 22.

At the time of the execution of the trust deed the defendant had made his loan of $30,000 to the Company under said agreement, and the Company was

then indebted to him in at least the amount of $20,000 as an unpaid balance on account thereof.

Record, p. 13, fol. 22.

The substance of the agreement of January 3rd, 1891, is, that in consideration of a loan by defendant to the Memphis Appeal Company he was appointed sole Eastern Agent for the Company at New York and Chicago, for the purpose of procuring and receiving advertising matter to be forwarded to the Company for publication in said newspaper, with power to make the rates therefor and to make collection for such publication, and to retain from the proceeds at least $1,000 monthly, and apply the same in liquidation of said loan remitting surplus, less his commission to the Company accordingly. Collateral security by way of Company notes and capital stock was to be given to the defendant.

Record, p. 11, etc., fol. 20, etc.

The loan was duly made, the collateral security given (which proved to be worthless) and the defendant entered upon the discharge of his duties as such agent, and on the execution and delivery of the said trust deed, September 20th, 1893, the Company was in possession of unpublished advertising matter which had theretofore been procured and forwarded by defendant to it under said agreement for publication in its said newspaper accordingly.

Record, p. 13, fols. 22-23.

This deed was subsequently declared void by the Supreme Court of Tennessee on appeal.

Record, p. 9, fol. 15, p. 15, fol. 26, p. 37, Sub. 3.

This advertising matter was subsequently published by said Receiver in said newspaper, after due notice to him by the defendant of his rights under the agreement, that if he made such publication, he, the defendant, would collect the accounts for the charges therefor and apply same towards the liquidation of the loan; the defendant collected such accounts and applied same within the limit of $1,000 per month accordingly, which absorbed the entire amount so collected, such collections being the money sued for herein.

Upon these facts the Court of Appeals sustained the defense set up by the answer, that defendant had the right under an agreement with the Company to make the collections in question and apply them upon such loan and had an equitable lien on the accounts and money for such purpose, and that the Receiver having published the accumulated advertising matter furnished the Company under the agreement, after due notice to him by defendant of his rights concerning the same, was deemed to have adopted the agreement to that extent and was bound accordingly.

So far then as the construction of the agreement is concerned and all questions of law and fact arising thereunder which comes within the decision of the Court of Appeals *and do not involve a federal question*, we assume this Court will not review under this Writ, and that as to such construction this Court will consider the same as *res adjudicata*, and that the Court of Appeals having construed the agreement and decided that the defendant had a lien upon all accounts arising under the agreement, and the right to collect and apply same in liquidation of his loan to the Company, and that the Receiver having published matter furnished to the Company by the defendant under the agreement,

after notice to him of defendant's rights concerning same, was bound by its terms, and this Court will not review such construction *unless it finds that the plaintiff had specially set up a federal question by his complaint, involving a construction of the agreement*, and as the record does not show any such a federal question, no such review will be made by this Court.

The practice of this Court on this subject has been long established and has but lately been reiterated by its decision of a case fully covering the one at bar.

> Kennard vs. Nebraska, 186 U. S., Part 2, p. 304.

Standing upon this assumption it would seem to be the established facts and law of the case at bar that under the terms and conditions of the agency agreement of January 3rd, 1891, the defendant had the right to collect the money in dispute in this action and had an equitable lien for such purpose on the accounts in question in the hands of the receiver, and that after such collection he had the right to apply the proceeds towards the liquidation of the balance due him from the Company upon his loan, and that this Court will not review the decision of the Court of Appeals on that subject, for it cannot be said that any federal question was set up by the plaintiff in his complaint which called for the construction of the agreement *based upon any Constitutional rights claimed by him*, the only federal questions, if any, being one as to the effect of certain practice decrees made in the Tennessee Chancery Court relating to proceedings, *in rem*, for winding up an insolvent corporation having a

situs in that State, but having no relation to the defendant's rights under the agreement.

Record, Com., p. 2.
Record, p. 51, fol. 91, etc.
Record, Ans., p. 6.
Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

Assuming that we are correct in the proposition that this Court will not review any question of fact or conclusion of law found by the Court of Appeals in its said construction of the agreement, we may pass to a consideration of the questions found on the face of the three Assignments of Error upon which this writ is based, and unless it appears by the record that there be a federal question raised for said construction, by the pleadings, as this Court may deem sufficient to invalidate the decision of the Court of Appeals, the decision of that Court as to the rights of the defendant under the agreement will stand as *res adjudicata*, and will not be the subject of review by this Court, or in other words, *the question before this Court is not to determine the rights of defendant or the receiver* under the agreement (the same having been determined by the Court of Appeals) *but to determine the effect of the sales decrees as to such rights.*

If, however, we are in error as to this conclusion, and this Court deems it a duty to review the judgment of the Court of Appeals as to such construction, we most respectfully submit the following to the consideration of the Court in support thereof:

(*a*) The defendant's rights under the agreement embraced a lien upon all accounts accruing for the publication of mat-

ter furnished by defendant thereunder, and his right to collect the same and apply the proceeds to the purposes stated in the agreement

(*b*) *The agreement was entire and indivisible* and the Receiver must be deemed to have adopted the same when he published the matter furnished by the defendant, after he had received notice of his claimed rights thereunder; he could not enjoy the benefits arising under the agreement and not share the burdens and obligations attaching thereto.

(*c*) The trust deed being void, and so decreed by the Supreme Court of Tennessee, the trustees nor the receiver had any title to the property therein mentioned, or to the accounts sold under the decree of sale, the same being the property of the Company by reason of its void trust deed, and therefore subject to the conditions of the agency agreement.

Pomeroy's Eq. Jur., Sec. 1237.
Overton's Liens, 1, 30, 266.
High's Receivers, 2nd Ed., §5, 440, etc.
Ming vs. Corbin, 142 N. Y., 340 opinion.
Pierson vs. Crooks, 115 N. Y., 554 opinion.
Ames vs. U. P. Ry., 60 Fed. Rep., 966.
Kneeland vs. Am. Loan Co., 136 U. S., 97.
Commercial vs. Beckwith, 167 N. Y., 329.

On the other hand the plaintiff rested his contention in the Trial Court and before the Appellate Courts of New York, that the defendant had no lien under the agency agreement and hence had no right to make the complained of collections *upon the case of So. Ex. Co. vs. Ry. Co.*, 99 *U. S.*, 151, *and other cases following the same.*

The defendant's counsel argued before the Court of Appeals, and is still of the same opinion, that the cases cited by plaintiff are not applicable to the one at bar, and the Court of Appeals in its opinion in this case so held.

Upon a consideration of the Express Company case which would be substantially a consideration of the others cited, it appears that case turned upon the construction of a contract providing for the mere crediting of certain amounts towards the liquidation of an indebtedness arising under the continued operation of the contract, and did not provide directly or indirectly for the collection or retention by either party of any property or money belonging to the other for the purpose of such crediting or liquidation, nor did the contract undertake to establish a lien for any purpose and the case was distinguished by the Court of Appeals from the one at bar accordingly.

Commercial Publishing Co. vs. Beckwith,
167 N. Y., 336, opinion.

POINT II.

The defendant's right to collect and devote the money in question to the purposes of the agreement was not affected by the decree of sale in the Tennessee Courts or the sale made thereunder.

The plaintiff in error to maintain the writ herein contends by three assignments of error, that the Court of Appeals acted in violation of the United States Constitutional rights of the plaintiff whose vendor was a purchaser at a judicial sale in Ten-

nessee under a decree of Courts therein made in an action to which he claims defendant was a party for the following reasons as generally summarized:

First. By deciding that the decrees of the Circuit Court of the United States for Western District of Tennessee directing and confirming certain sales were not binding upon the defendant, and that Crawford, the plaintiff's vendor, as the purchaser at the sale did not acquire a good title to the claims purchased, and that thereby was drawn in question in the New York State Courts a title claimed by plaintiff in error, under an authority exercised by the United States, and that such decision was against the title specifically set up and claimed by said plaintiff under said authority.

Record, p. 51, Subd. 1.

Second. By deciding that the decrees of the Chancery Court of the State of Tennessee directing and confirming certain sales were not binding upon the defendant herein, and that Crawford, the purchaser at the sale did not acquire a good title to the claims sold under said decree, and that thereby was drawn in question in the New York State Courts a title, right, privilege or immunity claimed by the plaintiff in error, in and by the United States Constitution and laws and that such decision was against the same as specifically set up or claimed by the plaintiff and that the said New York Courts in so deciding refused to give the records and proceedings of the Courts of the State of Tennessee due faith and credit, and thereby denied the United States Constitutional rights conferred on plaintiff in that regard.

Record, p. 52, Subd. 11.

Third. By deciding that Crawford, a purchaser

under a judicial sale in the State of Tennessee, did not acquire thereunder as against the defendant any title to the accounts in question herein, for that said defendant and William J. Chase, the Receiver, were both parties to the proceedings in the Tennessee Courts, and that such Courts having jurisdiction of these two parties decreed that such purchaser should have a title to the property purchased at the sale free and clear of all liens, claims and incumbrances, and that said defendant was bound by said decree as being such a party, and by reason of the New York Courts so deciding, there was drawn into question a Constitutional privilege claimed by plaintiff and that such decision was against the title, privilege, right or immunity specifically set up by the plaintiff in error of his right under the Constitution and laws of the United States.

Record, p. 52, Subd. 11.

In the consideration of the three assignments of error, the defendant in error, proceeding upon the basis that the construction of the agreement of January 3rd, 1891, by the Court of Appeals is *res adjudicata*, involves no federal question, and will not be reviewed by this Court under this writ, enters into a consideration of such assignments in their order respectively.

As to the First Assignment of Error:

The plaintiff contends that the decree of sale alleged to have been entered in the United States Circuit Court in Tennessee and the sale thereunder and its subsequent confirmation by that Court, operated to insure a good and valid title in the purchaser to the claims for advertising involved in this suit and bound the defendant in error accordingly, because he was a party to the suit in

which said decree was made, and that he was accordingly cut off and deprived of his rights and privileges under the agreement of January 3rd, 1891, regarding such accounts.

The first assignment of error proceeds upon the theory that the decree of sale of the property of an insolvent corporation had been made in the United States Circuit Court in and for the Western District of Tennessee in the trust deed suit in that Court, after the removal thereto of defendant's in error separable controversy from a suit pending in the Chancery Court of that State, that the defendant is bound by such decree for the sole reason that he was a party to the action so removed to the United States Circuit Court.

Record, p. 51-52, fol. 91.

In reply to this theory the defendant contends that it does not appear by the record that such a decree was entered in the United States Circuit Court suit to which he was a party, or that he had notice of application for such a decree.

This Court on examining the record will find that a suit was instituted by Gwynne and another as Trustees of a trust deed to them from the Memphis Appeal Company in the Chancery Court of Tennessee, and that defendant was a party in some way to said suit, and that such suit was to enforce the provisions of said deed and for no other purpose; *that the defendant in error thereupon caused to be removed such separable controversy therein* as he might have, to the United States Circuit Court on the ground of his non-residence in that State, *and that the Chancery Court thereupon lost jurisdiction of defendant and such controversy*, and that no proceedings were had in the said United States Circuit Court suit subsequent to such removal; that the original trust deed suit remaining

in the Chancery Court was consolidated by its decree with three creditor suits pending in that Court against the Memphis Appeal Company, and that such consolidation proceedings did not and could not apply to the trust deed suit *as removed to the Federal Court* by the defendant in error; that no decree as alleged to have been entered in the United States Circuit Court is set forth, and no notice of such entry or application for such decree was given to the defendant in that suit as so removed or otherwise, or that he had due notice of such entry; and no order of consolidation of such suit with any other suit was made or entered in the United States Circuit Court in the trust deed suit as so removed thereto, and for such reasons it would seem that if such a decree was made and entered the defendant was not bound thereby.

Record, p. 14, Sec. 12.

Again.

If such a decree was entered in the United States Circuit Court in a suit in which the defendant in error was a party, that fact alone does not make the decree binding upon him, he not having received due notice of application therefor, or had an opportunity to be heard thereon, no such notice appearing by the record, nor does it appear by the record that any such decree was entered in the suit so removed to the United States Circuit Court and while it is true that as appears by the record, that "similar decrees were entered in the United States Circuit Court," it *does not appear that such entry was in any case or proceeding in the United States Circuit Court to which the defendant was a party.*

Record, p. 14, fol. 25.

There is nothing on the record showing that the United States Circuit Court had jurisdiction of the

subject matter of the said decree of sale alleged to have been entered therein, and it does not appear that the creditor suits pending in the Chancery Court had been removed from that Court to the United States Circuit Court by any proceeding whatever, or that the said United States Circuit Court had any jurisdiction or authority to allow the entry in its office of a decree of sale similar to the one entered in the Chancery Court, and this Court will take judicial cognizance that *there is no practice in its subordinate Courts which will permit the entry of a decree such as is contended by plaintiff, was entered in the United States Circuit Court for the Western District of Tennessee.*

Record, p. 14, Sec. 25.

This Court will see by the record, that the consolidation of causes in the State Chancery Court was made in that Court and applied only to the causes therein, and did not, and could not, apply to or affect the seperable controversy of the defendant in error as removed to the Federal Court as aforesaid, *for it was to be relieved from the control of the State Court that the removal was had*, and that the record does not disclose the entry of any order for the consolidation of causes in the United States Circuit Court, or that any similar order to the consolidation order of the State Court was ever filed or entered in the United States Court.

Record, p. 14, Sec. 25.

The defendant in error therefore contends that the first assignment of error cannot be sustained for the following reasons:

1st. That no decree of sale or confirmation thereof was entered in the suit pending

in the United States Circuit Court to which defendant was a party.

2nd. That if such an order was entered in that suit or Court it was without notice to or knowledge of defendant in error, and therefore not binding upon him.

3rd. That the United States Circuit Court had no jurisdiction of the creditor suits, the parties thereto, or the subject matter involved therein.

4th. That the record does not show that the alleged "similar decrees of sale entered in the United States Circuit Court," were entered in the action pending therein to which defendant was a party; there may have been "similar decrees entered in the United States Circuit Court," but if they were entered in the suit removed as to defendant's controversy in that Court, the plaintiff in error should have had such decrees set out by the record.

5th. That the record does not show that the issues in the trust deed suit as removed by the defendant to the United States Circuit Court included the winding up of the Memphis Appeal Company *as an insolvent corporation*, and the sale of all of its corporate property, as would have been necessary to warrant a decree of sale of the character alleged to have been entered in that Court.

6th. That the record does not show the proper jurisdictional facts and conditions upon which to base the alleged entry of the

said alleged "similar decrees" in the United States Circuit Court for the Western District of Tennessee.

AS TO THE SECOND ASSIGNMENT OF ERROR:

The second assignment of error proceeds upon the theory that the defendant in error was bound by the decree of sale and confirmation made in the Chancery Court of Tennessee in the so-called consolidated action pending therein, for the reason that said defendant is alleged to have been a party to such consolidated action.

Record, p. 52.

By the record it appears that on the 5th day of October, 1893, there was pending in the Chancery Court of Tennessee an action by the trustees of a trust deed against the Memphis Appeal Company to enforce the terms thereof, to which action the Defendant in Error was made a party, but to what end or for what purpose the record does not disclose, the bill of complaint in the suit not being in the record, and that in this action Wm. J. Chase had been appointed a Receiver of the trust property covered by the deed, and it does not appear by the record that the defendant in error had any interest in said property or the object or result of the suit, and from a reading of the deed it would appear he had no interest thereunder or in the suit to enforce the same.

On or about October 5th, 1893, the defendant, being a non-resident of Tennessee, caused such controversy as he might have, if any, in the trust deed suit, to be removed therefrom to the United States Circuit Court for the Western District of Tennessee, and thereafter the said two Courts exercised concurrent jurisdiction of the trust deed action, that is to say, each Court exercised such juris-

diction concerning the action as being and remaining in them respectively, under the laws and practice pertaining thereto, the United States Circuit Court under the laws and practice of the United States as to Federal Courts, the Chancery Court under the laws and practice of Tennessee as to State Courts.

Record, p. 14, Sec. 10.

Subsequently three proceedings in the nature of creditors actions, *in rem*, were instituted in said Chancery Court by creditors of the Memphis Appeal Company, other than of those named in the trust deed, to wind up that corporation as an insolvent, but the record does not show that the Defendant in Error was a party to any of these suits or bound by the proceedings therein, he being a non-resident of that State, except so far as proceedings, *in rem*, would be binding upon such a non-resident.

On January 19th, 1894, the trust deed suit as remaining in the Chancery Court (after the removal of defendant's separable controversy to the United States Circuit Court) and the said three creditor suits were consolidated in the Chancery Court by its order of that date, *such order being entered ex parte, on the consent of the respective complainants therein only*, and the record does not show that any notice of application for such order was given to defendant in error or that he had opportunity of being heard in opposition thereto.

Record, p. 26, Sec. 4.

The record does not show that the defendant in error was ever within the jurisdiction of the Chancery Court of Tennessee *after the removal of his separable controversy to the Federal Court*, or

that he ever took any part in the proceedings in said Chancery Court actions as consolidated, or otherwise, but the plaintiff's counsel endeavors to mystify or mislead the Court as to the defendant's position in said consolidated action, by referring to matters extraneous to the facts stipulated for the trial, found in verifying Exhibits (Record, p. 31, fols. 54, 55 and 61) concerning litigation in no way material or pertinent to the case at bar, namely, that on or about March 26th, 1896, an action was or had been pending in the Chancery Court of Tennessee in which Foley-Williams Company was plaintiff and the Memphis Appeal Company was defendant (*said action not being one of those included in the consolidation order*) ,and that the defendant in error had filed a cross-bill in the Foley-Williams action, *for some purpose not appearing by the record*, and that the same was dismissed (Record, p. 31, fol. 54) for the stated reason that he had no lien upon "the fund in Court" (*presumably arising in the Foley-Williams' litigation*) for the payment of a judgment held by him against the Appeal Company (Record, p. 36, fol. 61), and although the disposition of defendant's bill is recited in a decree entered in the consolidated action, *it is not apparent why reference thereto should be made in that decree*, and it is clear that the sale of the Memphis Appeal Company's property under the decrees mentioned in this assignment of error was not a factor in the controversy in the Foley-Williams' proceeding, but on the contrary it appears that the defendant might have been a party to the Foley-Williams' Company action, *which was not included in such consolidation*, and that he had obtained a judgment of some kind against the Appeal Company which he sought to satisfy out of some fund in Court *arising out of that litigation*

as distinguished from that of the trust deed and the consolidated actions, but the nature of either the judgment or fund does not appear by the record, and so far as such fund is concerned *it is very clear that it was not one arising from the collection of the disputed accounts,* the subject of the present litigation, for it is manifest beyond all controversy, that the proceeds of such collections were never in the hands of the Receiver or constituted a "fund in Court" upon which an execution could have been levied in Tennessee, *for such proceeds were always in the hands of the defendant at New York, and never in the hands of the Receiver or a fund in the Court of Tennessee.*

Record, p. 3, Sec. IX-X, complaint.
Record, p. 14, Sec. 9, Facts.

This matter although contained in one of the Exhibits annexed to the stipulated facts, *was not one of such stipulated facts,* and so far as any question arising in the suit at bar is concerned, *must be considered as entirely extraneous to the questions before this Court,* for if the defendant was a party to the Foley-Williams Company suit against the Appeal Company it does not follow that he was a party to the consolidated action, of which the Foley-Williams suit *did not form a part.*

Stipulated Facts, Record, p. 11, fol. 19, etc.

The contents of Exhibits in verification of stipulated facts *do not add to such facts others not stated as such in the stipulation,* and can only be considered as supporting such stipulated facts to the extent applicable thereto, hence Exhibit 7, which is the only source of information as to the Foley-Williams' episode, and which was annexed to the stipulation *to verify only the facts of the Receiver's*

official actions and the final termination of the consolidated action, can be referred to only in connection with those facts and none other.

It is therefore the contention of the defendant that he was not a party to the consolidation action in the Chancery Court and that such Court lost jurisdiction of him and any controversy he might have had in the trust deed suit remaining in that Court upon its removal to the United States Circuit Court, *for the sole purpose of the Statute under which such removal was had, was to divest the State Court of such jurisdiction*, and it will be noticed by this Court that there is no stipulated fact that defendant was a party to the consolidation, and it will take judicial cognizance of the practice at its bar, *that no person can be made a party to an action by its consolidation with another, to which he is not a party, except upon the consent of all interested or by order of Court upon due cause shown.*

This assignment of error being upon the stated ground that the defendant was a party to the consolidated action in the Chancery Court and therefore bound by its decrees therein, must fall, as it does not appear by the record that he was such a party.

As to the Third Assignment of Error:

This third assignment of error proceeds upon the theory of the plaintiff in error that the defendant is bound by the decree of sale of some Court in Tennessee, *not specified in the assignment*, because as he alleges the defendant and Wm. J. Chase as Receiver in the trust deed suit as remaining in the Chancery Court, were parties to the action in which the said decree was made, and because such decree guarantees to the purchaser at the sale a title free from all claims, liens, etc.

It is not clear *which Court in Tennessee* the plaintiff refers to in this assignment as making the decrees, but as the record shows that the Chancery Court is the only one making such decrees, and as the Receiver was appointed in a suit in that Court, we assume that *it is the Chancery Court which is so referred to by plaintiff*, if however it is claimed by him that both the United States Circuit Court and Chancery Court are intended in such reference the answer is that the record does not show any sale decrees or confirmation thereof made by the United States Circuit Court *in a suit therein to which the defendant was a party*, or that there was any such action pending in that Court in which such a decree could be made, nor does it show that a Receiver was ever appointed in such United States Circuit Court action, or was a party thereto, nor does it show that any proceedings were ever had in that suit as removed to the Federal Court subsequent to such removal.

The Receiver was appointed by the Chancery Court, and it is clear that on the removal of the defendant's controversy to the United States Circuit Court, his official capacity continued with the Chancery Court action as left in that Court *and did not attach* to the suit as removed to the United States Ciruit Court, nor was he ever a party to either or any of the litigation set out by the record, but was merely an appointee of the Court and not a party, as such, to the suit in which he exercised his functions as such appointee.

As the record does not show that Chase was a Receiver in the suit as removed to the United States Circuit Court or a party thereto, the plaintiff must be mistaken in contending that the defendant and Receiver were parties to that suit, and if, on the other hand, he intends to be understood

that the defendant and Receiver were parties to the Chancery Court action, *his theory is defective, for that Court lost jurisdiction of defendant by reason of the removal order to the Federal Court,* and therefrom the defendant ceased to be a party to the State Court suit, consequently was not a party therein at the time of the making of the sale decrees by that Court, and hence it is clear that the first ground for the third assignment of error must fail.

As to the second ground for such third assignment of error, that the decrees guaranteed to the purchaser at the sale a good title to property purchased thereat free from all liens, etc., it is to be said, that such *a guarantee is no more binding upon the defendant than any other provision of the decree, unless he was bound by the decree as a whole, and that condition does not prevail in this case,* but the plaintiff contends that the *ipse dixit* of the Chancellor as voiced in the language of the decrees was potent to vitalize such an assumption of power, and that accordingly such guarantee cut off all defense to a claim purchased under the sale; while we are quite willing to accord to the learned counsel for the plaintiff in error the possession of high legal acquirements and much erudition, *we are not prepared to concede his contention that such a decree could be enforced against a secured creditor in the absence of evidence that the same was made upon due notice to a holder of a lien or an opportunity for him to protect his rights likely to be jeopardized by such a decree.*

In the case at bar the record is absolutely silent as to any evidence that the rights and privileges of the defendant in error arising under the agreement of January 3rd, 1891, or as involved by the decree containing such guarantee had ever been the subject of controversy or litigation in the Court in

which the decrees containing such guarantees were made, or that such agreement had been construed or been before any Court in any way, manner or form, in litigation in the Courts of Tennessee, and that being the case it seems incredible to us that a lawyer of such eminent standing in his profession as is the learned counsel for the plaintiff in error, should contend that the defendant could be thus summarily, arbitrarily and unjustly cut off and deprived of the assertion of his claims under that agreement.

While it is true that the record shows that the defendant and the receiver had a controversy regarding the performance of work imposed upon the Company by the agreement, *such controversy was no part of the proceedings then pending in the Chancery Court* action, and the record does not show that it or the subject matter of said controversy was included or involved in any issue arising in the trust deed suit, which was the only suit in which the defendant was a party, for the deed on its face does not support such a theory, *nor is the bill of complaint in the trust deed suit set up by the record.*

There is nothing in the record from beginning to end showing that any claim, right, or privilege in behalf of the defendant under the agreement of January 3rd, 1891, or that such agreement itself, ever played any part in litigation in the Tennessee Court or that the defendant's rights and claims to the moneys represented by the accounts in question, had ever been the subject of consideration in such Courts or been construed by any judicial tribunal therein, and as a consequence the guarantee of title in the decree did not cut off the right of claim to any property sold thereunder which the defendant had under such agreement.

But the plaintiff contends that the purchaser at

the sale was justified and protected in his purchase under the decree containing the said guarantee, because of its mere existence and presence on the face of the decree and having acted in good faith and dependency upon the statements and promises contained in the decree, and cites cases decided in both the United States and local State Court of Tennessee, but neither of these cases support such a proposition, for *it will be found on their examination that in each case, the rights and contentions of the parties making claims to the property sold at the judicial sale, had been considered and adjudicated in the litigation in which the decree was made for the sale of the property claimed*, such not being the condition in the case at bar, and it may be said that such cases really support the contentions of the defendant, that the guarantee in the decree of sale in the case at bar was not binding upon the defendant, for the reason that his rights under the agreement had not been considered and adjudicated in the proceeding in which the decrees were alleged to have been made and the sale had.

But the plaintiff in raising the question of "good faith," must also accord to the defendant the "good faith" attaching to liens, for if this attribute and quality of a lien, be lightly regarded, the stability of such a security would be precarious, indeed.

Again.

The plaintiff claims that if the rights of the defendant under the agreement of January 3rd, 1891, had not been actually considered and adjudicated in the Tennessee litigation, that they could have been so considered and adjudicated, but *that proposition is untenable, for this Court will not consider or review "that which might have been done" but only such matters as were actually adjudicated in the Tennessee litigation.*

The principle contained in this contention of defendant has been fully considered and adjudicated in this Court in a well considered case the ruling in which has never been questioned or modified by this Court.

Ray vs. Norseworthy, 23 Wall., 128.

> *"Notice in some form must be given in all "cases, else the judgment or decree will not "conclude a party whose right of property "would be divested by the proceeding.*
>
> *"No man is to be condemned without the "opportunity of making a defense or to have "his property taken from him by a judicial "sentence with out the privilege of showing, "if he can, that the pretext for so doing is un- "founded."*
>
> *Ray vs. Norseworthy*, 23 *Wall.*, 128 *opinion.*

On a comparison of that case with the one at bar, it will be found that each were proceedings to wind up the affairs of an insolvent and to sell its property.

Each Court had jurisdiction to order a sale of such property free and clear of liens and encumbrances; each Court ordered a sale without requiring notice of the application for such a decree to be given to the secured creditors.

The case at bar falls within the scope of the Ray case and must be governed by the law thereof accordingly, and it follows that under the rule in that case, the provisions in the decree of sale by the Tennessee Court that the purchaser of the property of the Appeal Company and the accounts due and to become due the receiver, would acquire title thereunder free and clear of all liens, claims

and encumbrances, *was not binding upon the defendant, he not having received notice of application for a decree containing such provisions, or had an opportunity to show, if he could, that he should not be deprived of property claimed by him or his lien thereon under the agency agreement.*

Ray vs. Norseworthy, *supra.*

POINT III.

The Court of Appeals did not act in conflict with the decrees made by the Courts in Tennessee.

The record does not show that the Court of Appeals acted in conflict with the sale decree of the Chancery Court in Tennessee or any other Court therein and so far as the action of the New York Court is concerned, except as shown on the face of its remittitur, the pleadings and stipulated facts, recourse must be had to the officially published report of the case (Commercial vs. Beckwith, 167 N. Y., 329) by which it appears that the only decision therein by that Court *was a reversal of Plaintiff's Judgment*, the grounds of the decision being that the moneys due for the accounts sold to Crawford under the sale decree of the Tennessee Court, to the extent of $1,000 monthly belonged to the defendant and any excess thereof to the receiver, *that there being no excess*, the receiver had no interest for the purchaser to acquire in the accounts so sold, and that the Tennessee Courts had not adjudicated the rights of the defendant under the agreement.

Neither the decree of sale or the sale thereunder were attacked or construed by the record before the Court of Appeals, and no disregard of the same

can be inferred from its reversal of the Supreme Court judgment, on the contrary, it must be said that had the Court of Appeals been of the opinion that the money in question belonged to the receiver, it would have held that the decree of sale protected the alleged title in the purchaser of the accounts representing the same.

The test, therefore, in this matter is now and ever has been, *did the money represented by the said accounts belong to the defendant or to the receiver*, and this test is not one to be decided by the language contained in a decree of sale made to apply generally to property belonging to an insolvent corporation or the receiver, it must be decided by a construction of the agreement itself, and as no construction thereof had been made by the Tennessee Courts, said construction was made by the Court of Appeals and is *res adjudicata*, and not in conflict with the language of such decree.

> Commercial Pub. Co. vs. Beckwith, 167 N. Y., 329.

The language of the decree cannot be injected into the construction of a contract, to alter or affect a written agreement evidencing the same unless the agreement itself was made the basis for such language by reason of a prior adjudication upon the same in the litigation out of which the decree arose.

The agreement not having been construed or defendant's rights under it adjudicated by the Tennessee Courts it cannot be properly contended that the Court of Appeals in its action construing the same was under any obligation to consider the decree as being before it in connection with such construction.

The construction of the agreement was the first consideration by the Court of Appeals, the lan-

guage of the decree of sale being extraneous matter to the agreement was not necessary or proper as a factor in such construction, and the rights of the defendant under the same being *res adjudicata*, and the decision of no federal question being necessary thereto, this Court will not interfere with or review the same under this writ.

Again

> *The accounts in question were sold subject to defendant's rights, equities and liens therein and thereto.*

The record shows that the sale as ordered by the Chancery Court and actually made under the decree was of all the property of the Memphis Appeal Company in general as an insolvent concern, and also all the trust property in the hands of Receiver Chase, *together with all the accounts that were due or to become due to him by reason of his conduct of the insolvent's newspaper*, but the accounts were not due nor could they become due to such Receiver (being subject to lien, claims and rights of deefndant under the agreement) until defendant had been satisfied of his claim therein, and until then no portion thereof could be regarded due or to become due or constitute any property in the Receiver's hands *or pass under the decree of sale.*

For the consideration of this point it may be sufficient to stand on the record itself, that is to say, it was not one of the stipulated facts before the New York Trial Court, that an absolute ownership by the Receiver of the accounts themselves appearing in Schedule B, Record, p. 5, were sold under the sales decree, *but only the Receiver's right, title and interest therein*, irrespective of what such interests might be, that were so sold (Record, p. 15, Sec. 13), but in addition to such fact, it is clear that no title can be given on a sale unless the property sold is owned by the seller who would thereby

be divested of such ownership, and as the Court of Appeals has adjudicated that the defendant is the owner of the sums due on the accounts sold under the decree (the Tennessee Courts not having adjudicated on that subject) the purchaser at the sale obtained no title thereto as against defendant's lien or claim under the agreement of January 3rd, 1891.

It therefore follows that so far as the Receiver is concerned the sale of the accounts in question was confined to his right, title and interest therein, and that the purchaser took such accounts or the paper writings representing the same, subject to all defenses, claims and liens of the defendant, and in the absence of notice of application for the decrees to defendant neither the language of the sale decrees or the fact of sale thereunder could dominate the action of the Court of Appeals which is made the basis of the writ now before this Court.

But the plaintiff insists that the accounts themselves and not only such right, title and interest were sold under the decree; this proposition may be conceded only on the theory that the accounts themselves were not the property of the Receiver but were the property of the company itself, by reason of the decree of the Appellate Court of Tennessee that the trust deed was void on its face, and if the company owned the accounts they were subject to the lien and claim of defendant under the agreement.

Record 9, fol. 15; Record 15, fol. 26; Record 37, Sec. 3.

POINT IV.

The rule in Murdoch vs. Memphis, 20 Wall., 634 governs the case at bar.

"1. It is essential to the jurisdiction of this "Court over the judgment of a State Court "that it appear that one of the questions men- "tioned in the act (Sec. 709, U. S. Rev. Sts.) "has been raised and presented to the State "Court.

"2. It must have been decided by the State "Court or that its decision was necessary to the "judgment rendered in the case.

"3. That the decision was against the right "claimed by plaintiff in error under the "Constitution, etc.

"4. These things appearing, the United "States Supreme Court has jurisdiction and "must examine the judgment so far as to ena- "ble it to decide whether the claim of right "was correctly adjudicated by the State Court.

"5. If it finds that it was rightly decided "the judgment must be affirmed.

"6. If it was erroneously decided against "the plaintiff in error this Court must furth- "er inquire whether there are any other mat- "ters adjudged by the State Court which "is sufficiently broad to maintain the judg- "ment of that Court notwithstanding the error "in deciding the federal question, and if this "is found to be the case the judgment must be "affirmed without regard to the soundness of "the decision on such other matter or issue.

"7. If it is found that the federal question is "of such controlling character that a correct "decision is necessary to any federal question "in the case, or that there has been no decision

"of State Court of any matter sufficient to sus-
"tain the judgment without regard to the fed-
"eral question, this Court will reverse the
"State Court, and will render such judgment
"as the State Court should have done, or re-
"mand the case," etc.

In the consideration of this rule which must govern the disposition of the writ by this Court, it is the contention of the defendant,

1st. That none of the questions required by the federal statute were raised and presented by the plaintiff to the State Court.

It is not sufficient to embody in a pleading matter which being subjected to microscopic examination may be said to embody some such question, but such matters must be clearly stated as being that upon which the pleader *relies for the relief asked for in the pleading*, and particularly so where such matter is accompanied by other matter upon which it is equally apparent that such asked for relief is based.

The matters in the complaint which the plaintiff in error now claims to have presented to the State Court as raising an alleged federal question is only to be found by reading the entire papers and *when found is substantially a recitation merely of an incident in litigation some time pending in the Courts of Tennessee*, and is part of the history of proceedings therein, extraneous to the rights of defendant under the agency agreement, and is not set up as a federal question upon which this Court is to understand the plaintiff relied for his recovery in the action, for it is nowhere found in that proceeding that plaintiff based his claim of title upon the effect of *the guarantee* found in the decree of sale, and it is apparent that he equally claimed title for the al-

leged reason that the receiver *owned the accounts* (sold to Crawford) *by virtue of his office* and that it was such ownership which was sold under the decree, and the only point upon which the plaintiff rested his contention before the Court of Appeals, as appears from the officially published report of the case, *was that the defendant had no lien upon the accounts in the hands of the receiver, and that the receiver's title was a sufficient one in the purchaser at the sale.*

> Commercial Pub. Co. vs. Beckwith, 167 N. Y., 331, Plffs. Points.

2nd. The record does not show that the Court of Appeals decided any federal question, or that a decision thereof was necessary to the judgment rendered in the case.

The decision of the Court was a construction of the agency agreement, the defendant's rights thereunder, and the ownership of the money due or to become due on the accounts in the hands of the receiver by reason of his operation of the business of the insolvent corporation, the other party to said agreement. The decision of a federal question, if any, presented by the pleadings was not necessary to the judgment ordered by the Court of Appeals, for such judgment was based upon facts independent of those upon which the federal question alleged to have been presented by the pleadings could be founded.

3rd. The decision of the Court of Appeals was not against any right claimed by plaintiff in error as arising under the Constitution of the United States, no such question having been clearly and plainly set up in his complaint in such a way as to lead the Court or the

defendant to know that he intended to rely thereon to the exclusion or in the place of other matter set up in the pleadings.

4th. None of the things mentioned in the 1st, 2nd, and 3rd sections of the rule referred to appearing by the record, this Court is not called upon to examine the judgment of the State Court from which this writ is taken.

5th. If on the other hand this Court finds by the record that a federal question necessary to the judgment was rightly decided by the State Court, or that no federal question presented for its decision was decided by it, this Court will affirm the judgment.

It is the defendant's contention that no federal question necessary to the judgment was disregarded by the Court of Appeals, but if such an one was presented to and decided by that Court it was properly decided, and would not effect the operation of the decree of sale containing the guarantee of title to purchasers free and clear from all liens, as such guarantee did not cut off the defendant's lien, he having had no notice of the application for the decree containing the same.

6th. If such a federal question was erroneously decided by the State Court of Appeals, this Court will further examine whether there was any other matter adjudged by that Court which is sufficient to sustain its judgment irrespective of error in the decision of such federal question, and if such matter appears the judgment will be affirmed without regard to the correctness of the decision of the federal question.

In the case at bar if a substantial and material federal question was clearly presented by the pleadings and erroneously decided by the Court of Appeals, *it was not necessary to the proper judgment in the case, for such judgment was based upon the generic and vested rights of defendant under the agency agreement, which had never been cut off or abridged by any adjudication thereon in a foreign Court, or by the decree of sale,* as such rights were those of ownership, and as such ownership was found by the Court of Appeals to be in the defendant and not in the insolvent or the receiver, no provision of the decree was violated, nor was any decision construing the legality or the effect of such decree necessary to be made by that Court for the purpose of the judgment ordered by it.

7th. If the reverse condition to those mentioned in the preceding sections of the rule prevails, the writ must be sustained, unless it appears that a correct decision of a substantial and material federal question, clearly and fairly presented by the pleadings, would be necessary to the judgment complained of, but as the case at bar is not one in which such "reverse conditions" appear, there does not seem to be any sufficient ground presented by the record for sustaining the writ.

It therefore follows that where the Court takes such a view of the case within the scope of the pleadings, that a decision of a federal question presented therein would not be necessary, its judgment in general will not be reviewed by this Court, and in such a case there would be no material disregard of such federal question. That there was no necessity for a decision of a federal question in

the case at bar is quite plain for the reason that the only material question presented to the Court of Appeals was, whether the defendant or the receiver was entitled to the money in question under a legal construction of the agreement, and the acts of the receiver in his publication of the advertising matter after notice of defendant's claims under the agreement, and for a decision of this question *it was only necessary to look to the agreement itself, and the stipulated facts as to such publication*, neither the language of the decree of sale or the fact of sale thereunder playing any part in the consideration of that question.

Chapman vs. Goodnow, 123 U. S., 540.
Avery vs. Popper, 179 U. S., 305.

POINT V.

The cases cited by the plaintiff in error to sustain his three assignments of error are inapplicable thereto.

The Court will find on examination of each of the cases cited by plaintiff in support of his assignments of error that the rights of the complaining parties in such cases had been directly or sufficiently litigated or adjudicated in the proceedings in which the complained of action of the Court was had, *and that such parties took such personal part in the proceedings that they were bound thereby.*

In the case at bar the defendant's rights had not been adjudicated in the Courts in which the decrees of sale were made, nor was he a party to such decree, nor did he receive any notice of applica-

tion therefor or have any opportunity to oppose the same.

Conclusions.

First. No federal question based upon Constitutional rights, upon which the plaintiff intended to rely for a recovery in this action, appears clearly and plainly by the record as having been set up by the pleadings.

Second. The defendant had a lien under the agency agreement upon all accounts arising by reason of the direct or indirect operation of that agreement both as between himself and the company and the receiver acting within the scope thereof.

Third. As between the defendant and the company, the agreement was entire and indivisible, and the same rule applied as to the receiver, who was but one *pendente lite*, and although he might not have been compelled to carry out the agreement, he must be deemed to have adopted it, when he published the advertising matter accumulated in the company's hands under it, with full notice to him by the defendant of his claims thereunder.

The receiver could not enjoy the benefits coming out of the agreement without sharing its obligations, principal of which was defendant's right and lien for the collection of the accounts in question.

Fourth. The receiver could not change the relation of principal and agent existing between the defendant and his patrons under the agreement, whose orders obtained by defendant were unexecuted by the Company at the

time of the appointment of the receiver by treating such patrons as his own on the books of the business as conducted by him, without consent of defendant.

Fifth. If the receiver desired to cut off the defendant from his rights under the agreement, he should have instituted some proceedings in the Tennessee Courts to that end, as such a burden did not rest upon defendant, but upon the receiver.

Sixth. The sale decree covered the accounts due and to become due the receiver, and although the accounts in question were claimed by receiver to be due to him, they were subject to the claim or lien of the defendant under the agreement and it was only the receiver's right, title and interest therein which was due and owing to him and sold under the decree, such interest being the surplus that might remain after the satisfaction of defendant's claim of $1,000 per month and commissions, pursuant to the agreement; there being no surplus, the purchaser took nothing but a naked interest.

Seventh. There is no federal question involved as to the rights of the defendant, the Company, or the receiver, arising under the agency agreement, *per se*.

Eighth. If there be any federal question presented by the pleadings it arises only upon the face of the decree of sale made in the Chancery Court of Tennessee and the sale thereunder.

Ninth. No federal question is set up by the pleadings, the decision of which by the New York Courts was necessary to a proper judgment entered therein.

Tenth. If there be a federal question set up by the pleadings a decision thereon was not necessary by reason of the View the New York Court of Appeals took of the rest of the case within the scope of the pleadings, and such view being correct, no disregard of the federal question can be considered as having been made by that Court.

Eleventh. The decision of the Court of Appeals construing the agency agreement and the rights of the defendant and the receiver thereunder, is *res adjudicata* and not reviewable by this Court.

Twelfth. No adjudication of defendant's rights under the agency agreement was made by the Tennessee Courts.

Thirteenth. The defendant was not a party to the actions as consolidated in the Chancery Court of Tennessee, *but had he been a party thereto, he would have been entitled to notice of application for the decree of sale.*

Fourteenth. The Chancery Court lost jurisdiction of the defendant and such controversy as he might have had in the trust deed suit, upon its removel to the Circuit Court of the United States.

Fifteenth. The case as removed to the United States Circuit Court was not included in the consolidation proceedings in the Chancery Court, and could not have been so included.

Sixteenth. The receiver was not a party to the suit so removed to the United States Cir-

cuit Court, nor was that suit consolidated with any other by order of that Court.

Seventeenth. The proceedings to wind up the insolvent Company were in the Chancery Court, and the United States Circuit Court had no jurisdiction thereof and no decree of sale of the property could have been entered in the suit as removed thereto by defendant.

Eighteenth. The Foley-Williams Company suit vs. the Memphis Appeal Company was not included in the order of the Chancery Court consolidating certain actions. The part alleged to have been taken by the defendant in that suit had no relation to the proceedings pending in the consolidated action or to the accounts sold under the sale decree to Crawford, or to defendant's rights under the agency agreement. The money in question in this action was collected by the defendant in New York and retained there by him under the agreement and was not a fund in the hands of the Court in Tennessee or the receiver in the trust deed suit.

Nineteenth. Neither the legality of the decree of sale or the sale thereunder are the subject of attack by the record; the defendant's claim to immunity therefrom is based upon his rights as a third party claiming title to the proceeds of the collection of said accounts sold under the decree by virtue of his lien, claims and privileges established by the agency of agreement.

Twentieth. The defendant had no notice of an application for a decree of sale containing a provision guaranteeing title to purchasers

free and clear of incumbrances, liens or otherwise, nor does the record show that he had an opportunity of opposing the same.

Twenty-first. The defendant is not concluded by the decree of sale or the provisions therein guaranteeing to purchasers a title free and clear of all encumbrances, for want of notice to him of application therefor.

Twenty-second. If there be a federal question set up by the pleadings, it is as to the effect of the decree of sale, the guarantee of title therein, and the sale thereunder and this question is not necessary of decision by reason of the view of the Court of Appeals took of the rest of the case within the scope of the pleadings.

Twenty-third Even had defendant received notice of application for decree containing guarantee of free and clear title and such a decree had been entered on his default the record noes not show that any Court in Tennessee had adjudicated upon the agency agreement *or that any cause existed which could invalidate his rights thereunder*. A vested right cannot be v[illegible]ted by a collateral proceeding.

Twenty-fourth. The trust deed having been declared void on its face by both the Supreme Appellate Court of Tennessee and the Chancery Court therein, the accounts in question were the property of the company and not property belonging to the receiver, and were subject to the terms and conditions of the agency agreement, inclusive of defendant's lien thereunder.

Twenty-fifth. The contentions of the plaintiff in error before this Court must be found in and confined to his three assignments of error upon which the writ is based.

Finally.

(*a*) The rights of the defendant, the company and the receiver under the agency contract are not to be determined by this Court, the Court of Appeals having determined the same, and no decision of a federal question was necessary to such a determination.

(*b*) The only federal question, if any, presented by the pleadings being as to the effect of the sale decree and the sale thereunder, and no notice of application therefor having been given to defendant he is not concluded by such decree or sale.

(*c*) Therefore, the federal question alleged by plaintiff to be present in the case should be decided adversely to him by this Court.

The motion to dismiss and affirmed should be granted as prayed, or

The writ dismissed and the judgment affirmed on the merits.

All of which is most respectfully submitted.

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Supreme Court of the United States.

No. 132.—October Term, 1902.

The Commercial Publishing Company, Plaintiff in Error, vs. Samuel C. Beckwith. } In error to the Supreme Court of the State of New York.

[February 23, 1903.]

A Tennessee corporation, styled the Commercial Publishing Company, brought this action in a court of the State of New York to recover from Samuel C. Beckwith a sum of money which, it was averred, belonged to the publishing company. It was alleged in the complaint that the right was derived from one Crawford, who, it was averred, became the owner of certain newspaper advertising accounts, on which payments had been made to Beckwith, the aggregate thereof constituting the amount sued for. The manner in which Crawford was asserted to have acquired the ownership of the accounts will appear in the following statement summarized from the pleadings:

On September 30, 1893 an action was begun in the Chancery Court of Shelby County, Tennessee, to foreclose a deed of trust which had been made by the Memphis Appeal Company, publishers of a newspaper known as the Memphis Appeal-Avalanche. Samuel C. Beckwith was made a party defendant to the cause. Cotemporaneously with the filing of the bill, a receiver of the assets of the newspaper company was appointed, and he continued the publication of the paper. Although the complaint in the action at bar did not set out the nature of the controversy in the Tennessee suit between the trustees, who were plaintiffs in the action, and Beckwith, it was alleged that a short time after the bill was filed Beckwith procured the removal to a Circuit Court of the United States of a separate controversy existing between himself and the trustees, in which court it was averred such controversy thereafter continued. Subsequently, it was alleged, other actions were filed in the Tennessee court against the Memphis Appeal Company, which actions were ultimately consolidated with the trustee cause. It was charged that in the month of April, 1894, like decrees were simultaneously entered in the consolidated actions in the State court and in the one which had been removed to the United States court, and that, under such decrees, a sale was had on June 16, 1894, of the

property vested in the receiver, including the accounts due said receiver, representing moneys earned by the receiver in the operation of the newspaper, of which the accounts upon which Beckwith had collected the money sued for formed a part. At this sale, it was alleged, Crawford became the purchaser of all the property embraced in the order of sale, and he thereafter assigned his purchase to the plaintiff.

In an amended answer Beckwith admitted having collected and retained the moneys sued for, and specially denied the other allegations of the complaint. He also set up as a defense that he had collected the moneys in question rightfully, under the authority of an agreement with the Memphis Appeal Company made prior to the execution of the deed of trust heretofore referred to. He further alleged that the receiver never acquired title to the moneys, and had never offered for sale or sold any right or title thereto. Subsequently, by supplemental answer, it was alleged that after the execution of the decrees of sale, and on appeal from a final decree which had been entered in the consolidated cause, the Supreme Court of the State of Tennessee adjudicated that the trust deed and all proceedings based thereon were null and void, and that, by reason thereof, the sale in question was a nullity.

The action at bar was tried by a jury, upon an agreed statement of facts. By direction of the court there was a verdict in favor of the plaintiff for the full amount claimed. This judgment was affirmed by the appellate division of the Supreme Court of the State of New York. An appeal was then taken to the Court of Appeals of the State, which reversed the judgment, and ordered the complaint to be dismissed with costs. (167 N. Y. 329.) The judgment of the Court of Appeals having been made that of the trial court, a writ of error from this court was prosecuted.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

As in the complaint the plaintiff in error unquestionably set up a right to recover as the result of a judicial sale made under decrees, both of courts of the United States and of a State, Federal questions exist in the record, and the motion which has been made to dismiss is therefore denied.

Coming to the merits, the questions for decision are whether due effect was given by the Court of Appeals of New York to the decrees in question. (*Jacobs* v. *Marks*, 182 U. S. 583, 587.)

Two questions were considered by the State court in its opinion, viz: 1, the meaning and effect of the contract entered into between Beckwith and the Memphis Appeal Company; and, 2, whether the rights of Beckwith under the contract had been conclusively adjudicated by the prior litigation in Tennessee.

The agreement referred to was evidenced by two letters and endorsements thereon, and a copy thereof is contained in the margin.*

In disposing of the first question the court held that "The clause of the agreement giving to Beckwith the right to collect all of the bills was evidently intended to give him the control of the proceeds resulting from the advertisements, so that he could apply the same upon his loan to the amount of $1,000 per month," and that the clause referred to "was in the nature of an equitable pledge of the receipts for that purpose. It was further held that the receiver of the newspaper took possession of the assets and business thereof subject to the liens and obligations of the corporation, (in other words, took only the interest which the corporation had in the property which it assumed to possess and own,) and as the receiver "accepted and published the advertisements procured by the defendant (Beckwith), he (the receiver) must be deemed to have done so under the contract which the defendant (Beckwith) had with the corporation, and under that contract the defendant had the right to collect the moneys accruing for such advertisements, and to retain out of such collections a sum not to exceed $1,000 per month, to be applied upon the loan." It is manifest that the question of the proper construction of this contract being non-Federal in its nature, is not subject to review, and we consequently assume that the construction was correct.

The second question was treated as involving only the issue of *res judicata*. Considering the final decree entered in the consolidated action, and the decree as subsequently entered by the trial court upon the mandate of

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*MEMPHIS, TENN., *Jan.* 3, 1891.

S. C. BECKWITH,

48 *Tribune Building New York City.*

DEAR SIR: In consideration of special efforts which you pledge yourself to make in our behalf to the best of your efforts and ability, and furthermore, in consideration of allowing you nothing in the shape of salary, office rents or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1st, 1891, and sooner if possible, on a plain commission basis of twenty-five per cent on all business for all that portion of the United States, north of a line running east and west with the southerly boundary of Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

All applications for rates, space, &c, from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent or advertisers, from your territory (which, however, is not contemplated,) we will allow you the commission named upon same, and refer it to you for collection.

You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and, in event of that, you are simply to lose your commission, but not to be liable beyond that.

You are not to represent any other morning paper in the State of Tennessee or

the Supreme Court of Tennessee, it was decided that the Tennessee court "did not adjudicate nor attempt to determine the right of Beckwith to the moneys received by him for advertisements inserted in the paper by the receiver after his appointment." The court then said—evidently assuming that the last decree embodied the direction for sale—"Under the judgment the purchaser became entitled to all moneys due and owing to the receiver by reason of the publication of the paper, but moneys that did not belong to the receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question." In effect, therefore, the Court of Appeals of New York construed the decrees of sale and held that the direction to sell merely authorized a sale of the right, title and interest of the receiver in the accounts in question and left for future determination, in any controversy which might arise in respect thereto, the question of the extent of the interest, if any, of the receiver in such accounts.

The sole contentions which are open for our consideration is, did this judgment fail to give full faith and credit to the judicial proceedings in the Tennessee courts as required by section 1 of article IV of the Constitu-

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Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the Appeal-Avalanche.

MEMPHIS APPEAL-AVALANCHE COMPANY.
T. B. HATCHETT, *Bus. Manager.*

Accepted. S. C. BECKWITH.

MEMPHIS, TENN., *Jan. 3d*, 1891.

The Memphis Appeal Company, Memphis, Tenn.

GENTLEMEN: In consideration of a contract this day entered into by and between us, I hereby agree to advance to you thirty thousand dollars ($30,000.00,) as follows:

$5,000 in cash on or before January 7th, $5,000 on or before the 12th of January, 1891, then $5,000 on the 26th of January, 1891, to take up your note now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

The amount named of $30,000.00 to be loaned you on the Appeal Company's notes, endorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your company, and which stock shall not be increased without my consent during the term of this loan; neither shall any encumbrance be placed upon same.

Said loan and interest at six per cent to be paid me in monthly installments by monies coming into my hands from the advertising in your paper, in amounts, say $1,000 per month, until paid.

S. C. BECKWITH.

O. K.: MEMPHIS APPEAL COMPANY.
T. B. HATCHETT, *Business Manager.*

(Endorsed): As the debt is reduced I will surrender stock collateral *pro rata.*—S. C. Beckwith.

tion, and did it deny due efficacy to a title or right claimed under an authority exercised under the United States. It is strenuously argued that, properly interpreted, the decrees directed a sale of the accounts as they stood on the books of the receiver, and that the effect of the decrees and the sale made thereunder was that any right to or lien possessed by Beckwith in the moneys due upon the accounts was transferred to the proceeds of sale of all the property of the Memphis Appeal.

In considering this question it is to be observed that the records of the proceedings in the actions in which the decrees relied upon were rendered were not offered at the trial below, but that the case was disposed of solely upon an agreed statement of facts, to which certain of the decrees made in those actions were annexed as exhibits. To this agreed statement therefore, and to it alone, we are to look, for the purpose of determining the question presented for decision. A summary of the statement will be found in the margin.*

*On January 3, 1891, the Memphis Appeal Company, then engaged in publishing a newspaper at Memphis, entered into the contract with Beckwith which has heretofore been set out. Beckwith made the advances stipulated and $20,000 thereof was owing to him at the time the action at bar was instituted. While the Memphis Appeal Company was a going concern Beckwith, under the contract aforesaid, procured advertising orders, the indebtedness upon which collected by him was the basis of the recovery sought in this action. After the making of the contract and prior to September 30, 1893, the Memphis Appeal Company executed a deed of trust upon its property to secure certain creditors. On the date named Andrew D. Gwynne and others, the trustees under the deed of trust, brought suit to enforce that instrument. Beckwith was made a party defendant, and a receiver was appointed, who took possession of the property of the Memphis Appeal Company and continued the publication of its newspaper from September 30, 1893, to June 16, 1894. On October 5, 1893, Beckwith procured the removal of the controversy between himself and the trustees into a court of the United States, and that controversy there continued, though it does not appear how it was terminated, if it ever was.

Beckwith served written notice on the receiver that he claimed that his rights under the contract were not affected by the appointment of the receiver, and the receiver replied disputing the right of Beckwith to collect moneys for advertising matter which might be published by the receiver.

After the institution of the trustee suit sundry actions were filed in the same court by general creditors and others against the Memphis Appeal Company, which were afterwards consolidated with the trustee suit. In April, 1894, in the consolidated action, and in the action pending in the United States court, a decree of sale was entered, "on the motion of the several complainants," directing a sale of the property in the hands of the receiver, because of the asserted fact that the property was deteriorating and was not self-supporting. The property which was ordered to be sold, after due advertisement, was thus described in the order:

"The Memphis Appeal-Avalanche newspaper, with all the rights, privileges, benefits, franchises, &c., belonging to or in any way pertaining to same, together with its good will, subscription list, advertising patronage, income and profits, and all the

It is to be borne in mind that upon the plaintiff in error rested the burden of establishing that the decrees of sale were not given the due effect to which they were entitled, and if it has failed to sustain such burden this court cannot say that error was committed by the judgment below rendered.

The decrees of sale were made in the consolidated action in the State court and in the action pending in the United States court, and preceded, by nearly two years, the making of the final decree, which however was entered only in the consolidated cause, and not in the action pending in the United States court. It is disclosed by the record that in two of the actions which were consolidated—that filed by the trustee and one on behalf of certain employees of the Memphis Appeal Company—liens were asserted upon all the assets which came into the possession of the receiver, viz., those embraced in the deed of trust which was sought to be foreclosed. The deed of trust was made long after the execution of the contract between Beckwith and the Memphis Appeal Company, and vested rights, if any, of Beckwith were not affected by the execution of the deed or by the appointment of a receiver. The agreed statement is silent as to what was the controversy between the trustees

machinery, appliances, furniture, material, property, assets, &c., of every kind and description, and the general outfit of the newspaper now in the hands of the receiver in these causes.

"He will sell all and every kind and description of property in his hands, saving and except the uncollected book accounts of the Memphis Appeal Company, accruing prior to his appointment as receiver, and which were placed in his hands for collection. Such of these accounts as remain uncollected will not be sold.

"All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same. And such purchaser will take the property decreed to be sold herein, subject to all of the contract obligations incurred by the receiver, and will assume the payment of same, including any amount due the receiver on the day of sale for overchecks made by him for personal advances on account of the property in his hands. Excepting only the certificates issued by the receiver for the payment of which the purchaser shall in no way be liable."

After directing that the receiver report his proceedings under the decree to the court, it was further recited as follows:

"The purchaser at the sale herein ordered will acquire the absolute title to all the property decreed to be sold, free from all claims, liens, and incumbrances whatever, save as provided above as to the contract obligations of the receiver; and the proceeds of sale will stand in these causes in lieu and place of the property itself."

Subsequently the decree of sale was modified by directing a sale to be made by the clerks of the respective courts, as commissioners. Respecting the sale and the confirmation thereof, it is recited in the agreed statement as follows (italics not in original):

"13. Thereafter and on the 16th day of June, 1894, said commissioners, acting under the decrees aforesaid, sold at public auction in the city of Memphis, the proprety aforesaid, *and also all the right, title and interest of said receiver to the various sums*

and Beckwith, but Beckwith, in the correspondence with the receiver claimed that his contract right was unaffected by the receivership. Now, in the recital in the decrees of sale of the property to be sold there is first an enumeration of property generally, in language similar to that contained in the deed of trust; there is then an exemption from sale of uncollected book accounts accruing prior to the appointment of the receiver; and next is the following recital: "All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same." It may be fairly inferred, that Beckwith then was and prior thereto had been making direct collections from advertisers under the assumed authority of the contract, and he was undoubtedly asserting the right to retain the moneys which he might collect upon advertisements which had been procured by him. The sum due upon such accounts for advertisements published by the receiver was small as compared with the main assets in the custody of the receiver, yet, in that portion of the decree which made the liens and encumbrances operative against the proceeds of sale, the entire proceeds of sale and not the proceeds of a particular portion of the property sold were made subject to all liens and encumbrances sought to be enforced in the litigation.

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forth in Exhibit B annexed to the complaint herein, and in and to the claims of said receiver against the parties therein mentioned for said advertisements published by said receiver for their account in said Memphis Appeal-Avalanche between September 30, 1893, *and June* 16, 1894, *as aforesaid*, when and where same was struck off to one West J. Crawford, he paying therefor to said J. B. Clough and E. B. McHenry as such commissions the sum of $65,200, and he being the highest, best and last bidder therefor. That whatever title the receiver had to said sums set forth in Exhibit B was derived from said trust deed and his appointment as such receiver. On the 3d day of July, 1894, decrees were simultaneously entered in said actions thus pending in said chancery court of Shelby County, and said Circuit Court of the United States, confirming the sale."

On March 26, 1896, a final decree was entered in the consolidated action determining the rights of a large number of persons, one such being Beckwith, whose claim of a lien on the fund under an execution issued in an action brought by a named party other than Beckwith, in which action judgment had been obtained against the Memphis Appeal Company was overruled and he was allowed an appeal. A portion of the defendants thereafter prosecuted an appeal to the Supreme Court of Tennessee, and after the decision of that appeal a decree was entered in the trial court in conformity to the directions of the Appellate Court, on July 8, 1896. The appeal of Beckwith was disposed of by a general affirmance of the decree below, except as particularly specified in the judgment of the Appellate Court.

Crawford, the purchaser at the sale, "duly assigned and transferred to the plaintiff all his claims, demands and right of action against the defendant, which he acquired by virtue of the sale of June 16, 1894, above referred to." As heretofore stated, the collections made by Beckwith sought to be recovered in the action at bar were made on advertising orders procured by Beckwith under the contract and published by the receiver.

As before stated, the record shows that, in two of the actions which had been consolidated, the complainants were asserting liens against *all* the property which had come into the possession of the receiver, and the decree of sale recites that the sale was ordered upon the motion of the complainants. Beckwith nowhere appears to have been an active participant in obtaining such decree or assenting thereto. It does not even appear that, at the time of the entry of the decrees of sale, he was a party to any of the actions which had been consolidated, for it cannot in reason be so inferred from the mere circumstance that nearly two years after, on the entry of the final decree, he is referred to therein as being a cross complainant in one of the actions seeking to enforce a lien, the nature of which was not disclosed.

The stipulations contained in the agreed statement, particularly the recitals in subdivision numbered 13, lend color to the construction that, as respects the accounts in question, all that was intended to be sold was the right, title and interest of the receiver therein, the nature and extent of which title was left unadjudicated. The expression, "the property aforesaid," used in the paragraph, it may well be argued, was intended to refer to something distinct from the accounts in question, and the language may properly be interpreted as relating to the property covered by the trust deed, which came into the possession of the receiver. A reasonable construction of the paragraph can be adopted supporting the claim that, as regards the accounts, all that was sold was the right, title and interest of the receiver therein. In the light, therefore, of all the circumstances which have been detailed, we cannot sustain the contention of the plaintiff in error that the guaranty clause of the decrees, transferring liens upon the property to the proceeds of sale, was intended to apply to the accounts in question without indulging in conjecture and giving to the plaintiff in error the benefit of the doubts which arise as to the precise meaning of the decrees.

The parties having chosen to try the case on a statement of facts, which does not afford us the means of saying with that certainty which is required, that the judgment below denied due faith and credit to the decrees in question, we cannot, in view of the burden of proof, reverse the judgment below; and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.